UNITED STATES DEPARTMENT OF AGRICULTURE
Bureau of Agricultural Economics
Washington, D.C.

SUMMARIES OF DECISIONS BY THE SECRETARY OF AGRICULTURE
of complaints filed under
THE PERISHABLE AGRICULTURAL COMMODITIES ACT

No. 4 - NOT TO BE PUBLISHED - July 1, 1936

I N D E X

ALPHABETICAL INDEX
TO
UNPUBLISHED SUMMARIES OF SECRETARY'S DECISIONS

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" " " "	Hungerford Supply Co.	1887	1118
" " " "	Red Apple Orchard, Inc.	1904	1119
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" " " "	Williams & Haney	1942	1236
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PACA SUMMARIES OF DECISIONS NOT TO BE PUBLISHED

S-1047, July 11, 1935, Docket 1517: (S.P.)

LITMAN PRODUCE CO., KANSAS CITY, MO. vs. FRANK JILL OF FLORIDA, INC., FORT LAUDERDALE, FLORIDA.

Violation charged: Failure to deliver.
Principal points involved: Delivered sale with f.o.b. provision applying only to price; buyer failed to prove damages for failure to deliver because he did not show any contract with other buyers for purchase of the produce ordered, but damages purely speculative; respondent's attorney could not claim rejection not made within reasonable time as controversy based on breach of warranty and not rejection.
Order: Case dismissed

Outline of Facts

On March 16, 1934, the parties entered into a written contract for the purchase and sale of one carload of U.S. No. 1 tomatoes containing 600 lugs of different sizes for a total price of $681.50 f.o.b. Midriver, Florida. The original confirmation of sale showed that the sale was made f.o.b. subject to the special agreement of "U. S. One on arrival at Kansas City". The tomatoes arrived at Kansas City shortly after noon on March 20, 1934 and doorway inspection was made and the tomatoes inspected were found to conform to the specifications of the contract. The respondent was then paid in full. Later a further inspection of the tomatoes indicated that many of them were not U.S. No. 1, and after a hundred or a hundred and fifty lugs had been removed from the car the remaining tomatoes were inspected by a Federal Inspector at 3:15 P.M. March 22. This inspection certificate showed that the tomatoes were clean, meaty, generally well formed, fairly regular and uniform, conforming in size to the specifications in the contract but that there were grade defects averaging 12% and an average of 7% decay and, therefore, the tomatoes did not grade U.S. No. 1 on account of defects in excess of tolerance. The tomatoes were sold from March 22 to March 29, 1934, inclusive, and brought $1,116.10; the price of U.S. No. 1 tomatoes for the sizes called for in the contract increased materially from March 20 to March 22, 1934.

Complainant contended that the proper method of arriving at damages is to subtract the amount the tomatoes actually brought between March 22 and March 29, 1934, inclusive, from the market value of the tomatoes on March 22 or March 23, 1934. Respondent contended that the complainant was not entitled to any damages and in any event his method of computation was wrong in that the tomatoes arrived shortly after noon on March 20, 1934, and this date should be taken, at which time the market vlaue of U.S. No. 1 tomatoes was less, instead of taking the market value of tomatoes as of March 22, 1934.

Rulings included in Decision

1. The transaction in this case was in effect a delivered sale with the f.o.b. provision applying only to the price to be paid in that complainant was to pay the freight, and, on acceptance at destination, to remit to respondent the contract purchase price of the tomatoes only.

2. There can be no doubt but that respondent failed to deliver U.S. No. 1 tomatoes as contracted, and the position of respondent's counsel to the effect that no objection can now be made by complainant since objection was not made within twenty-four hours after arrival of the shipment at destination is untenable, since the controversy is not based upon rejection, but upon a breach of warranty. Complainant certainly acted within a reasonable time in making objection to the shipment involved in this case.

3. Complainant, in order to be able to recover in a case of this kind, must show conclusively that a contract had been entered into by some certain buyer or buyers for the purchase of the kind and quality of tomatoes ordered by complainant at an agreed price or prices and the purely speculative contention of complainant that the tomatoes could have been sold readily at the quoted market price can not be accepted. This position, which is relied upon entirely by complainant is wholly unsubstantiated by any testimony from prospective buyers. The case was therefore dismissed.

S-1048, July 11, 1935, Docket 1624: (S.P.)

SPRINGFIELD FRUIT AND PRODUCE CO., INC., SPRINGFIELD, MASS., vs. URICK & HOLLIS, LOS ANGELES, CALIF.

Violation charged: Failure to deliver.
Principal point involved: Complainant contributed to deterioration of grapes by its negligence and failed to prove any damages suffered.
Order: Case dismissed.

Outline of Facts

Respondent sold to complainant a carload of grapes to contain 735 lugs of Malaga and 302 lugs of Seedless, Chicago Diversion, the grapes to be U.S. No. 1 grade, good color and good size, price of $1.00 per lug for the Malagas and $1.10 per lug for the Seedless, delivered Springfield, Mass. Apparently complainant contemplated Federal inspection early in the morning of arrival and its broker wired respondent that the grapes were unsatisfactory and insisted on a discount, which was refused. It was at least fifty-two hours later before respondent had Government inspection made and then the car had been partly unloaded. At that time the Government inspection stated that

"Malagas fail to grade U.S. No. 1 table only account wilted and soft berries. Thompson seedless now fails to grade U.S. 1 table only account shattering or loose berries noted above, as per government inspection certificate No. B 245853". Complainant, however, accepted the grapes and sold them at an actual profit of $94.05 over the contract price. However, it later filed complaint against respondent for failure to deliver in accordance with the contract terms and based its damages on the difference between what it actually received for the grapes and the "published market price" being a claimed difference of $217.35. Apparently the "published market price" was taken from local newspaper reports of the market prices at the time.

Rulings included in Decision

1. The Government inspection was made at least 52 hours and possibly 64 hours after arrival. The doubt as to the length of the period arises by virtue of the fact that the inspection certificate bears the time designation as 9:20 p.m., whereas, the true time according to complainant was 9:20 a.m. It should be noted further that at least one-fourth of the load had been removed by complainant prior to such inspection. Considering the possibility of exposure to deleterious conditions during this intervening period and the slight extent of the variance from grade upon inspection it is difficult to determine what was the true condition of the grapes on arrival and it can hardly be said, therefore, that complainant has shown a failure to deliver in accordance with the contract. Furthermore, complainant not only contributed by its negligence to the delay in inspection but also interfered with the accuracy of the inspection by its removal of part of the carload at least fifty hours in advance of such inspection.

2. Complainant not having shown the failure of respondent to deliver in accordance with the terms of the contract, it is unnecessary to consider the amount of the damages claimed by it. Suffice it to say that on its own showing it made an actual profit on the transaction of $94.05. The case was dismissed.

S-1051, July 13, 1935, Docket 1672: (S.P.)

SOUTHERN FRUIT COMPANY, INC., CHARLOTTE, N.C. vs. WILLIAM GRUBGELD, PHILADELPHIA, PA.

Violation charged: Failure to account.
Principal point involved: Brown Rot in peaches; fob shipping point sale but no Federal inspection secured at that point and therefore consideration given to Federal inspection at destination regarded as reflecting true condition of commodity at shipping point.
Order: Case dismissed.

Outline of Facts

Complainant sold respondent, through one J.E. Umbach, four carloads of U.S. No.1 peaches f.o.b. shipping point. Mr. Umbach apparently saw the peaches at various times during loading but no Federal inspection at shipping point was secured by the shipper. Two of the cars arrived at destination on a Saturday and inspection was applied for too late for that day's inspection but the two cars and an additional two cars which arrived on Monday were all inspected by Federal inspector on Monday morning. The cars were in transit not to exceed four days, yet certificates of Federal inspection made at destination showed that Brown Rot was present in all cars with the damage ranging from an average of 4 per cent in the last two cars shipped to an average of approximately 30 per cent in the cars shipped two days earlier. Respondent immediately notified complainant of the condition of the peaches. The contract price was $2,470.20 and respondent remitted to complainant the sum of $1,963.02, deducting $507.18 due to the condition of the peaches. Complainant contended that the cars were bought f.o.b. shipping point, that the peaches met the contract requirements and that respondent unlawfully deducted the $507.18.

Ruling included in Decision

1. Although this was an f.o.b. sale, it has been repeatedly held that in such cases where no satisfactory proof is secured concerning the condition of the commodity at shipping point, consideration must be given to the certificates of Federal inspection made at destination insofar as they can be regarded as reflecting the true condition of the commodity at shipping point. Destination inspection in this case conclusively showed considerable damage from Brown Rot, which, from the very nature of the disease, must have been present at shipping point, regardless of the extent to which it may have been readily apparent. As previously stated, there can be no doubt but that Brown Rot was present at destination to an extent which materially reduced the value of the peaches, and respondent complained promptly of this damaged condition which,as evidenced by the certificate of Federal inspection, was of sufficient gravity to have warranted rejection. Considering the record as a whole, it seems reasonable to believe that complainant has received all that the kind and quality of peaches shipped were worth, and the complaint should, therefore, be dismissed.

S-1053, July 16, 1935, Docket 1559: (S.P.)

HERMAN FRANZBLAU COMPANY, DETROIT, MICH., vs. DANIELS AND PETERS, FRESNO, CALIF.

Violation charged: Failure to account.
Principal point involved: Telegrams passing between parties considered in determining instructions.
Order: Case dismissed.

Outline of Facts

Respondent diverted to complainant a car of Malaga grapes requesting him to inspect them and submit an offer. Upon arrival complainant wired the respondent that the grapes were fairly good quality; that it had not succeeded in selling at private sale and suggested selling on the auction quoting prices which other brands had brought. To this respondent replied that it was not interested in the auction but to sell at private sale and that it was "holding car permit you to sell answer quick". The next day complainant wired respondent that it had sold car at $1.00 delivered at Detroit, this price netting $484.72. Complainant later wired respondent that the grapes were "billed advise"; that it had sold the car and wished its quick release. The complainant then issued a certified check to the railroad company for $732.72 which was 125% of the sales price less freight; this was done in order to get the car released and effect diversion to the purchaser. On the same day the respondent wired the complainant "SEE OUR WIRE FIFTEENTH TO SUBMIT OFFER EXCHANGE WIRES CLEAR WE HOLDING CAR PERMIT YOU SUBMIT OFFER BEFORE SALE DOLLAR ENTIRELY UNREASONABLE OFFER". Complainant contended that respondent had given authority to sell the grapes at the best possible price; that $1.00 delivered was the best price obtainable; that the net proceeds of the sale amounted to $439.32; that complainant was entitled to the difference between this amount and the amount paid the railroad company or $293.40. Respondent's contention was that it had at no time authorized the sale at $1.00; that it had instructed complainant to submit an offer and later advised that it was holding the car in order to permit its sale and that respondent did not give authority to the complainant to sell at the best possible price or any other price.

Rulings included in Decision

1. The exchange of wires sets out the agreement between the parties.

2. Respondent did not intend to instruct complainant to sell without submitting the offer to the respondent.

3. Complainant exceeded its authority and suffered damage thereby. Respondent can not be said to have in any way contributed to the cause of the loss and can not be held liable therefor.

S-1054, July 16, 1935, Docket 1647: (Hearing)

J.T. WYLIE, SAN JOSE, CALIF. vs. MANNIELLO BROS. AND MAYRSOHN, INC., NEW YORK, N.Y.

Violations charged: Rejection and failure to deliver.
Principal points involved: San Jose scale in pears for export to Brazil; when federal shipping point inspection shows produce met terms of contract and is reversed at destination, shipper cannot be held for failure to deliver.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract whereby complainant was to furnish respondent with one carload of Hardy pears, grade U.S. No. 1, at the price of $2.00 per box, f.o.b. San Jose, Calif. It was also agreed by and between the parties that complainant was to furnish pears, which, upon inspection at shipping point, would show that they were "free from San Jose scale". Federal inspection of the pears at shipping point showed them "to be apparently free of injurious insects and plant diseases except" that less than one-half of one per cent of the pears showed "codling moth" injury. Federal inspection at New York showed that upon an examination of 13 boxes he found one pear infested with codling moth larvae and one pear infested with San Jose scale. The respondent had purchased the pears for re-shipment to a customer located in Brazil, South America, and in order for respondent to use the pears in making delivery upon the export contract, inspection was required showing that they were free from San Jose scale. Following the inspection at New York respondent refused to accept the car and complainant made resale to another purchaser resulting in a loss of $516.50. Complainant contended that respondent's rejection was without reasonable cause as the car met the terms of the contract and respondent made a countercomplaint contending that the complainant did not supply a car free of San Jose scale and that respondent was deprived of its legitimate profit in the sale of the car to its client in Brazil in the sum of $329.02.

Rulings included in Decision

1. San Jose scale is not a transportation development. The pears either were or were not affected at the time of purchase. San Jose scale is an insect injury, hence the presence of the injury found at destination is proof that the fruit was affected at loading point. The shipping point inspector found no evidence of such injury in particular samples examined by him. The destination inspector found "one pear infected with San Jose scale" upon his inspection of samples taken from 13 boxes. This was sufficient to prevent shipment of the load to Brazil, and it can not be said that respondent rejected "without reasonable cause".

2. It has been held that where a shipper warrants a commodity as being of a certain grade, as for instance, grade U.S. No. 1, and bases such warranty upon a federal inspection showing that grade, the shipper can not be held in damages for a failure to deliver in accordance with the terms of sale, even though the federal shipping point inspection certificate is later reversed at destination. The reasoning in such cases should also be applied here. It can not be said, therefore, that complainant failed to "deliver in accordance with the terms of the contract without reasonable cause". The case was therefore dismissed.

S-1057, July 19, 1935, Docket 1594: (S.P.)

PACIFIC FRUIT & PRODUCE CO., SEATTLE, WASH. vs. J. ROBINSON FRUIT CO., OMAHA, NEBRASKA.

Violation charged: Rejection
Principal points involved: "F.o.b. acceptance" and "f.o.b. acceptance final".
Order: Case dismissed.

Outline of Facts

Complainant and respondent attempted to contract through a broker for the purchase and sale of a carload of mixed vegetables in which were included 300 hampers of green beans. The respondent rejected the car upon arrival stating that the beans were not fresh and crisp when shipped, but were old and full grown. Complainant resold the car at a loss of $425.45 and requested damages in that amount.

Complainant contended that the beans were sold "f.o.b. acceptance final", while the memorandum of sale made out by the broker specifies "f.o.b. acceptance". All negotiations were carried on by the parties through the O.C. Timmons Distributing Co. brokers, who, although advised by complainant that this transaction was to be on an "f.o.b. acceptance final" basis failed to so notify respondent or to insert such a provision in the memorandum of sale.

Ruling included in Decision

An examination and comparison of the wires exchanged disclosed that the parties failed to come to such an understanding as to amount to a contract. In addition to this, the confirmation of sale introduces the condition "f.o.b. acceptance", which was not included in the exchange of wires. Clearly in view of these conflicting specifications relied upon by the parties it can not be said there was a meeting of the minds. In this case, therefore, obviously no contract was entered into. This position is further strengthened by a consideration of the rules and regulations promulgated under the act with which the parties hereto must

be presumed to have been familiar. Under Paragraph 12 of Regulation 8, promulgated under the Act, it is provided that the term "f.o.b. acceptance" shall be deemed to mean the same as f.o.b. except that the buyer assumes full responsibility for the goods at shipping point and has no right of rejection on arrival, nor has he any recourse against the shipper because of any change in condition of the goods in transit, unless the goods when shipped were not in suitable shipping condition. Under Paragraph 13 of the same Regulation, it is provided, that the term "f.o.b. acceptance final" shall be deemed to mean that the buyer accepts the commodity f.o.b. cars at shipping point without recourse.

S-1059, July 23, 1935, Docket 1572: (S.P.)

STERLING H. NELSON CO., SALT LAKE CITY, UTAH. vs. AUGUST STOERK, INC., CHICAGO, ILL.

Violation charged: Rejection.
Principal points involved: Complainant held strictly to allegations set forth in complicated complaint; delay in shipment.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent a carload of U.S. No. 1 Spanish onions at the agreed price of $1.40 per 50# bag, or for the net sum of $782.15, f.o.b. Utah shipping point, to be shipped Monday, Jan. 8, 1934. In attempted compliance with the contract complainant shipped a car of U.S. No. 1 onions of 1½" minimum size on Wednesday, January 10. Upon arrival respondent rejected, claiming that they were not of the kind, quality and grade ordered and complainant resold the onions at a net loss of $76.75.

The complaint in this case was rather complicated and the testimony contradictory. However, respondent claimed that he was acting only as broker and that complainant knew that the respondent made a practice of acting as broker without disclosing the name of the principal.

The complaint stated definitely that complainant "sold to respondent one carload of onions, U.S. 1, 3" minimum" while the Federal State inspection certificate showed that the onions graded "U.S. one 1½" minimum". The record indicated, however, that the complainant may be in error in this respect since the telegrams included in the record showed that a total of three carloads of onions were included in shipments to be made by complainant to respondent and that the onions contained in the car in this controversy were in the second car shipped and were to be 1½" minimum.

Rulings included in Decision.

1. In connection with the last contention mentioned above, complainant should be held strictly to the allegations set forth in the complaint, particularly in a complicated case of this sort.

2. Any decision rendered in this case must be based entirely on the testimony found in the record, which showed clearly that no purchaser other than respondent was mentioned until a considerable time after the sale was consummated and the shipment rejected. Also it should be noted that no confirmation of sale was prepared by respondent and respondent's claim that the sale had actually been made to some third person before consummation was wired to complainant is wholly unsupported by testimony of those who respondent claims purchased the onions. This being the case, respondent must be considered as the only party to the transaction known to complainant.

3. The confirmation of sale specified definitely that shipment was to be made on Monday, January 8, 1934 and the record showed that the onions were not shipped until two days later, or Wednesday, January 10. Shipment therefore was not made as required by the terms of the contract and for that reason the rejection by respondent was not without reasonable cause. The complaint was therefore dismissed.

S-1063, July 26, 1935, Docket 1661: (S.P.)

D. D. DUNN, GREELEY, COLO., vs. BURKE RIDDICK, MEMPHIS, TENN.

Violation charged: Failure to account.
Principal point involved: Accounting on joint account agreement.
Order: Reparation awarded complainant in the sum of $206, with interest.

Outline of Facts

Complainant and respondent entered into an agreement whereby complainant was to ship two carloads of potatoes to respondent who was to sell the potatoes and remit to complainant the net sale price, plus half the profit or minus half the loss. The potatoes in car PFE 27594, which were invoiced to respondent at $300 were sold for $244, or at a loss of $86; and the potatoes in car PFE 50999, which were invoiced to respondent at $285 were sold for $193 or at a loss of $92. Respondent collected the selling price for each carload of potatoes and according to the agreement between the parties was entitled to deduct half the loss from the invoice price of each car, thus leaving a balance due and owing to complainant of $287 on car PFE 27594 and $239 on the potatoes in car PFE 50999, or a total of $526, due and owing complainant on completion of the sales involved. The respondent paid a total of $320 on the account, leaving a balance due complainant of $206.

Respondent contended that complainant should stand all the loss on both shipments rather than half the loss as contracted. Complainant apparently was willing to stand all the loss providing the balance of the claim had been paid a year or more ago but now contends that this concession was made in contemplation of prompt settlement, which respondent failed to make.

Ruling included in Decision

Certainly there is no basis for respondent's claim that complainant should now be required to accept a reduction which he offered to make a year or two ago if prompt settlement was made at that time. Respondent's failure to pay the full amount of the selling price, less half the loss, was in violation of the Act.

S-1065, August 13, 1935, Docket 1445: (Hearing)

H. ROTHSTEIN & SON, PHILADELPHIA, PA. vs. J.S. KRASNOW, PITTSBURGH, PA.

Violation charged: Failure to account.
Principal points involved: Cars sold on consignment on joint account agreement; charges not paid, although a legal liability, should not be included in damages.
Order: Reparation awarded complainant in the sum of $413.76 with interest.

Outline of Facts

Complainant and respondent entered into a joint account agreement which provided for the delivery to respondent by complainant of three carloads of peas known as Fogkist Brand. According to the agreement respondent was to pay 75¢ per package f.o.b. California shipping point plus $50 per car for top ice and $15 per car "brokerage". The peas were to be sold by respondent at New York City on a "joint account basis" and after payment of the agreed cost price and the transportation, icing and brokerage charges the parties were to divide equally the net returns or losses derived from the sale of the shipments. Federal shipping point inspections on two of the cars stated that they were "approximately 85% U.S. No. 1 quality" and the other car graded U.S. No. 1. The first two cars above mentioned failed to grade U.S. No. 1 on account of defects in excess of tolerance upon arrival at destination and the third car failed to grade U.S. No. 1 on account decay. Respondent accepted the cars and sold them and made remittance of $383.76 less than the cost price.

Respondent also purchased from complainant an interstate carload shipment of carrots contained in car PFE 34138 f.o.b. Santa Maria, California and in remitting to complainant the purchase price failed to pay an item of $30 top ice in addition to the purchase price. It also appeared that this car was delivered by the carrier to Gecks Brothers upon written direction of respondent. The freight charges amounted to $522.23 and demurrage $69, or a total of $591.23. Respondent paid $177.37 to the New York Central on account, and the carrier demanded payment of the balance due from complainant as the original consignee. Complainant asked reparation based on respondent's failure to pay the full freight charges.

Rulings included in Decision

1. Payment of freight charges is made a prerequisite to the delivery of the goods by Section 3, Paragraph 2 of the (49 U.S.C.A. Sec. 3) Interstate Commerce Act. It has been held that the original consignor is primarily liable for payment of freight charges. See A.T. & S.F. Ry. Co. v. Hunt Bros. Fruit Co., 34 Fed. (2d) 582; New York Central Ry. Co. v. Union Oil Co. of Pa., 53 Fed. (2d) 1066. In the instant case complainant was both consignor and consignee. Complainant however has not actually paid the freight charges. The question is therefore presented as to whether such fixed legal liability should be accepted as sufficient proof of damages so as to include such item in complainant's reparation award. On reasoning it would seem that the showing of such fixed legal liability should be accepted as proof of damages, but no decisions have been found where the question has been directly passed upon. Under these circumstances it is believed this item should not be included as a part of complainant's reparation award. The record is deemed sufficient, however, to warrant the entering of a reparation award in complainant's favor covering the cost of top ice in the amount of $30 and the balance remaining unpaid of the agreed cost price of the peas in the sum of $383.76, making a total of $413.76.

S-1066, August 17, 1935, Docket 1787: (S.P.)

MAX B. COHEN, PALMETTO, FLA. vs. ABE COHEN COMPANY, INC., ROCHESTER, N.Y.

Violation charged: Rejection.
Principal point involved: Complainant failed to prove it shipped a car of "real fancy" escarole.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of one carload of "real fancy" escarole f.o.b. Palmetto, Florida. Complainant contended that respondent rejected the car upon arrival without reasonable cause. Respondent contended that the car did not meet the terms of the contract in that the escarole showed no heart formation and had irregular slime throughout with evidence of tip-burn; that immediately upon discovery of its inferiority respondent declined to accept same and duly notified complainant thereof, unless an adjustment of price was made based on the fair reasonable value of it, and that due to the diversion of the car by complainant respondent was not afforded an opportunity to have the escarole inspected by a representative of the United States Department of Agriculture.

Ruling included in Decision

The question at issue is whether the escarole was "real fancy". It is incumbent upon the complainant to establish this by a fair preponderance of the evidence. No Federal inspection certificate was obtained at point of origin, destination or at New York City, the place to which it was finally diverted and sold. Each party's sworn statements tended to support its claim, but as the complainant failed to establish by a fair preponderance of the evidence that the escarole complied with the contract of sale, the complaint was dismissed.

S-1067, August 17, 1935, Docket 1633: (S.P.)

CAMBRIDGE FRUIT & PRODUCE CO., CAMBRIDGE, OHIO, vs. H.D.SOJOURNER AND CO. HOPEWELL, MISSISSIPPI.

Violation charged: Failure to deliver.
Principal point involved: Complainant must prove damages.
Order: Case dismissed.

Outline of Facts

Complainant alleged that respondent sold to complainant a carload of tomatoes to be US-1 straight pack 6x6 and larger, at $1.05 per lug delivered; that complainant had no oportunity to inspect the tomatoes until they arrived at Cambridge; that the inspection proved the tomatoes did not grade US-1 and the tomatoes were also inspected by a Federal inspector and the Federal inspection certificate showed that the tomatoes had an average decay of 12%; that on account of respondent's failure to supply a replacement car complainant was forced to replace the tomatoes to the extent "of his necessity" and thereby incurred additional expense in the sum of $49.60, which included $7.95 for inspection and $1.65 for long distance 'phone calls essential to the purchase of these two replacement lots, and that respondent's failure to ship tomatoes of the kind, grade and quality specified in the contract was without reasonable cause and in violation of the Act.

Respondent contended that the tomatoes were inspected at point of origin and were shown to grade US-1 and to conform otherwise to the contract of sale; that the car should have arrived at Cambridge on June 9 and was not inspected until June 12, or three days after the car was due to arrive; that the inspection at destination does not reverse the inspection made at point of shipment as to grade or quality, but related solely to decay; that the inspection was restricted to the condition of the top three layers and it is well known that where tomatoes are shipped without refrigeration the decay is very largely in the top layers; that when the car is standing still the decay is much greater than when the car is moving; that the market for tomatoes declined after the delivery and had the complainant purchased a carload of tomatoes there would not have been any loss sustained; that in any event complainant should have replaced the tomatoes by purchasing another carload instead of purchasing tomatoes in less than carload quantities, because the price is greater per unit in less than carload quantities, as well as the freight charged.

The evidence showed that the tomatoes were sold on a delivered basis at Cambridge, Ohio and the tomatoes actually arrived on Sunday morning, June 10. The complainant was notified by the carrier of the arrival about 8 o'clock A.M. Monday, June 11, and inspected the tomatoes at 8:30 o'clock A.M. on the same day. The tomatoes were inspected by Federal inspector at Cambridge on June 12, 1934, at 12:30 P.M., at which time they showed decay averaging approximately 12%. This inspection was restricted to condition of the top three layers of the load.

Ruling included in Decision

It is incumbent upon complainant, irrespective of whether the complainant is consignor or consignee, to establish the claim for reparation by a fair preponderance of the evidence. Tomatoes may decay rapidly in hot weather when shipped under ventilation while standing on the track. The inspection certificate relied upon by the complainant, which was made at 12:30 P.M. June 12, showing an average of approximately 12% decay at that time in the three upper layers, does not necessarily show that the decay was in excess of the tolerance permitted for U.S.-1 tomatoes at the time the tomatoes arrived at Cambridge. The case was therefore dismissed.

S-1070, August 17, 1935, Dockets 1659 and 1659-A: (S.P.)

MRS. D.E. GOODENOUGH, COUDERSPORT, PA. vs. DORR T. MARTIN, CORNING, N.Y. AND COUNTERCOMPLAINT.

Violation charged: Rejection.
Principal points involved: Complainant failed to comply with contract; respondent failed to prove any damages in countercomplaint.
Order: Case dismissed.

Outline of Facts

Complainant alleged that she sold to respondent one carload of US-1 potatoes at $2.05 per hundred-pound sack to be delivered at Washington, D.C.; that the respondent rejected the potatoes but not within the "48 hour limit as required by your department"; that following the rejection of the potatoes by respondent, the latter agreed to purchase them at $1.85 per hundred-pound sack, and directed that the car be diverted to Richmond, Va.; that complainant followed the directions and delivered the potatoes at Richmond but they were uncalled for by the respondent; that respondent therefore rejected the potatoes at Richmond and they were finally sold to J.A. Heisler Sons of Richmond for $1.65 per hundred pounds at a loss of 40¢ per hundred pounds, or a total of $144, plus demurrage and additional freight paid by complainant of $93.53, and an additional brokerage fee paid to Edward L. Frost & Co. of $15, resulting in total damages to complainant of $252.53.

The evidence showed that the potatoes arrived at Washington on March 14 and Federal inspection made on March 15 showed that they did not grade U.S. No. 1 because of a large percentage of grade defects. Respondent notified complainant of the rejection in 24 hours and attempted to dispose of the potatoes for complainant at the best price obtainable.

Respondent thought he could sell the potatoes in Washington at $1.85 per hundred pounds but found that this could not be done and promptly advised complainant's son by telephone in regard to the matter, advising him to divert the potatoes to Richmond and to advise Edward L. Frost a broker, who would sell the potatoes for complainant.

Respondent filed counter complaint alleging damages of $300 against the complainant for failure to deliver a car of US-1 potatoes as called for in the contract of sale.

Ruling included in Decision

Complainant did not ship a carload of potatoes as called for in the contract of sale and the complaint was dismissed. Respondent failed to submit any evidence of damages sustained by failure of complainant to ship a carload of potatoes conforming to the specifications of the contract of sale and therefore the countercomplaint was dismissed.

S-1071, August 15, 1935, Docket 1653: (S.P.)

RICHMAN & SAMUELS, INC., NEW YORK, N.Y. vs. THOMAS CAITO & SONS, INC., CLEVELAND, OHIO.

Violation charged: Rejection.
Principal points involved: Use of term "good" size berries indefinite and should be discouraged; "medium" size berries did not meet contract for "good" size.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent one car containing 1008 lugs of seedless grapes at 72½¢ per lug, f.o.b. California, the contract containing the following stipulation: "Understanding bunches and berries good size, berries firmly attached." Federal inspection at shipping point showed that the berries were "Bunches mostly medium, some large, few small; in most lugs berries mostly medium, some large, some small, in many lugs mostly medium, many large, few small." The condition was shown as "Mature average sugar test 22.5. Uniformly well colored. Berries fresh, generally firm and firmly attached. Most stems fresh, many wilted. Defects within grade tolerance". This being an f.o.b. shipment, condition at point of origin is prima facie the determining factor. Respondent contended that (1) the inspection at origin upon which complainant depends for its case, shows a non-compliance in respect to size and (2) that this inspection report does not show a condition which later developed into a defect, i.e., "an inherent disease which caused the berries to fall from the stems and develop abnormal decay, and which accounts for the badly shattering condition and the abnormal decay as revealed by the federal inspection in Cleveland."

Ruling included in Decision

Whether or not complainant fulfilled his contract as to the size of the berries depends upon the construction to be placed upon the words "good size". If these words had not been inserted into the contract, it might readily be stated that a medium size berry would have been satisfactory. It is evident therefore that it was the intention of the parties that some significance should be placed upon the use of such words. The word "good" as a measure of size is concededly indefinite and its use in such a way should be discouraged but, having been used in this case, it should be given a meaning, if possible, without doing violence to the rights of either party. Words of this character should be given thier commonly accepted meaning and such meaning we may find by reference to the dictionary. Funk & Wagnall's (1929) defines the word "good" as a measure of size, quantity or distance, as follows: "Not small or insignificant though not extremely great or important; considerable; as a good deal; a good way off", and Webster's International (1933) gives the following definition: "In excess rather than lacking or deficient; ample; full; thorough; as a good thrashing, a good day's work. Good measure, pressed down, and shaken together, and running over. Considerable; not small, insignificant or of no account; especially in the phrases, a good deal, a good way, a good degree, a good share or part, a good while, etc." It is evident from the above that the word, when used as a qualifying adjective, carries the significance of being more than ordinary, even though to a slight extent, or more or larger than medium, the word "medium" being synonymous with "ordinary" as applied to size. The inspection in California showed some of the berries to be large and few small but mostly medium. This would indicate that the berries averaged a medium size. As said above, "good size" means larger than "medium". Therefore, the grapes did not meet the specifications of the contract with regard to size and the respondent's rejection was not without reasonable cause.

S-1072, August 15, 1935, Docket 1571: (S.P.)

JOSEPH EICHELBERGER & CO., EUSTIS, FLA. vs. J.B. NICHOLS & SON, BALTIMORE, MD.

Violation charged: Rejection.
Principal points involved: Term "good quality cutters" for watermelons is indefinite specification; restricted inspection at destination may clearly reveal commodity not in suitable shipping condition or may even justify reversal of shipping point inspection but standing alone can hardly be considered satisfactory evidence that goods shipped on f.o.b. contract complied with contract at shipping point; destination inspection can be considered only in so far as it tends to show quality and condition of commodity at time and place of shipment.
Order: Case dismissed.

Outline of Facts

Complainant sold respondent a car of watermelons and upon arrival of the car respondent rejected. The transaction was negotiated through a broker who conducted the sale by an exchange of telegrams with the complainant. The contract called for "Good quality cutters" 28 pounds each average at $200 f.o.b. Upon arrival of the car an inspection report of the Railroad Perishable Inspection Agency showed that the melons ranged in size from 24 to 30 pounds, averaging 28 pounds each, and an average of 35 per cent of the carload was sunburned with 8 per cent showing stings or scars. This report also showed that the melons were found to be mature, ripe and firm with the added statement that three melons were "seen with a spot of soft rot". Respondent then rejected the shipment contending that many of the melons were sunburned and the shipment as a whole was not of first class melons as ordered. Complainant diverted the car to New York where the first Federal inspection was made, approximately two days after respondent had received the shipment. This inspection showed that the car was partly unloaded before the inspection was made, but the remaining portion of the car was graded U.S. No. 1 with the added comment that Grade defects were well within tolerances allowed for the grade of U.S. No. 1.

Rulings included in Decision

1. The Federal inspection covered only a portion of the carload, which, so far as anything contained in the record showed, may have been the best portion of the shipment. A restricted inspection at destination may clearly reveal that the commodity was not in suitable shipping condition or in certain cases may even justify reversal of a shipping point inspection certificate, but standing alone can hardly be considered as satisfactory evidence that goods shipped on an f.o.b. contract complied with that contract at shipping point. In such cases it has been repeatedly held that the destination inspection can be considered only in so far as it tends to show the quality and condition of the commodity at the time and place of shipment. Such an inspection might have been adequate in this case had the inspection covered the entire shipment, but as previously stated, since it covers only a portion of the shipment, it should receive very little, if any, consideration.

2. The contract agreement called for "good quality cutters". This is not only an exceedingly vague and indefinite description of the watermelons to be shipped, but there is nothing in the record to show that "good quality cutters" were actually shipped. Since complainant failed to show that "good quality cutters" were actually shipped as called for in the contract, the complainant must be dismissed.

S-1075, August 20, 1935, Docket 1750: (S.P.)

IDAHO FALLS (BONDED) WAREHOUSE CO., IDAHO FALLS, IDAHO, vs. KOHLER & SCHAFER, PHILADELPHIA, PA.

Violation charged: Rejection.
Principal points involved: Car rolling on date contract entered into did not comply with contract calling for "prompt shipment"; potatoes which were only "fairly bright" did not meet terms of "bright".
Order: Case dismissed

Outline of Facts

Complainant and respondent, on September 26,1934 through a duly authorized broker, entered into a written contract for the sale and purchase of a carload of U.S. No. 1 Idaho potatoes in hundred-pound sacks "bright stock" prompt shipment at $1.90 per hundred pounds delivered at Philadelphia, Pa. Respondent had expected shipment on September 27 and arrival of the car about October 5. However, the car was rolling at the time the contract was entered into calling for "prompt shipment" and complainant failed to advise respondent of that fact. The car arrived on October 3 and after securing Federal inspection which showed that the potatoes were "fairly bright" respondent rejected, contending that complainant, after confirming the order for prompt shipment, should have notified respondent that the car was rolling, and that the potatoes did not meet the contract terms.

Complainant charged respondent with rejection without reasonable cause and that the car was billed from Burley, Idaho on September 25 and diverted on September 27 to respondent at Philadelphia.

Ruling included in Decision

Complainant did not comply with the terms of sale when it shipped a rolling car on a contract calling for prompt shipment, and one containing potatoes which were only "fairly bright" instead of "bright". The case was dismissed.

S-1080, August 21, 1935, Docket 1731: (S.P.)

SHACKELFORD-BROWN CO., ALBANY, GEORGIA, vs. DAVE KELLER, CLEVELAND, OHIO.

Violation charged: Rejection.
Principal point involved: Anthracnose showing watermelons not in suitable shipping condition.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract, through a broker, for the purchase and sale of a carload of Watermelons. Following an exchange of telegrams between the broker and the complainant the broker issued a memorandum of sale as follows: "One car reasonably uniform size 28 average Watsons $175 f.o.b. Buyer specifies must be first class red cutters Shipper confirms quality is excellent, Government inspected best stock moving." Inspection made at Florida shipping point showed the quality of the melons as "mature, clean, bright, generally good green color, * * * . Flesh is pale red to red, mostly red, * * *. Grade defects within tolerance. No decay" and that the stock graded U.S. No. 1. Federal inspection of the melons upon arrival at Cleveland showed the melons to be "pale red to red, mostly pale red" and "Anthracnose, ranging from 20 spots on some melons to 2/3 of surface of other melons badly spotted, most showing 1/4 to 1/2 of surface badly spotted", that 2% of the melons showed decay, being Stem End Rot, and that they then failed to grade U.S. No. 1 on account of the extent of decay and Anthracnose. Following this inspection the respondent refused to accept the shipment.

Ruling included in Decision

1. Anthracnose is a field disease which first appears on the vines. The rapid growth of the disease during transit in the instant case indicates that notwithstanding the quality and condition shown by shipping point inspection the melons were not in suitable shipping condition to arrive at destination without abnormal deterioration. The melons were not of "excellent" quality nor did they cut red. Under these circumstances respondent's refusal to accept the shipment did not amount to a rejection without reasonable cause, and the complaint must be dismissed.

S-1083, August 28, 1935, Docket 1573: (S.P.)

WOLVERINE FRUIT & PRODUCE EXCHANGE, AGENTS, GRAND RAPIDS, MICH., vs SPRACALE FRUIT COMPANY, PITTSBURGH, PA.

Violation charged: Rejection.
Principal point involved: Buyer signed confirmation of sale and car met terms of that contract.
Order: Reparation awarded complainant in the sum of $265 with interest.

Outline of Facts

Complainant acting as agent for the Fennville Fruit Exchange, Grand Rapids, Mich. sold to respondent through a broker acting for both parties, one carload of U.S. No. 1 Bartlett pears at $1.65 per bushel. Upon arrival of the pears respondent rejected and complainant resold for the net sum of $395, which was $265 less than the original price of the car.

Respondent contended that while "we signed confirmation for straight U.S. No. 1 grade" the broker "showed us a wire". The evidence disclosed that the confirmation of sale was not signed by the respondent until after receipt of the telegram from complainant which read as follows: "ANSWERING YOU CAN HAVE MY PERSONAL ASSURANCE SPRACALE PEARS WILL ARRIVE GREEN HARD AND ALL RIGHT FOR COLD STORAGE UNDER STANDARD REFRIGERATION BUT CANNOT CONFIRM EXCEPT AS USONE TWO INCH AND LARGER BECAUSE ASSOCIATION WONT ACCEPT ANY FURTHER DESCRIPTION STOP UNLESS YOU ADVISE OTHERWISE WILL SHIP TOMORROW STOP THESE PEARS INSPECTED BY FEDERAL INSPECTORS HERE AND ACCEPTANCE IS EXPECTED". The above telegram was sent by complainant, who was acting as agent for the Fennville Fruit Exchange, to the broker. The confirmation of sale, which was signed by the respondent, read in part: "One (1) car U.S. #1 2" and larger Bartlett Pears, ringfaced tub bushels $1.65 per bu. F.O.B." The Federal shipping point inspection made on August 30 at Fennville, Michigan showed that the pears were U.S. No. 1 and otherwise conformed to the specifications of the confirmation of sale. After sending the telegram to the broker the complainant heard nothing further from either the broker or the respondent until after the pears were shipped and arrived at Pittsburgh. The respondent, instead of advising the complainant he desired a modification of the confirmation of sale, signed it and the pears were shipped by Fennville Fruit Exchange relying upon the confirmation of sale.

Ruling included in Decision

The pears conformed to the specifications of the contract of sale and respondent's rejection was without reasonable cause. Reparation was awarded complainant in the sum of $265, with interest.

S-1084, Sept. 5,1935, Docket 1649: (S.P.)

JOSEPH SCHWARTZ, NEW YORK, N.Y. vs. WASHINGTON EARLY CROPS, INC., KENNEWICK, WASHINGTON.

Violation charged: Failure to deliver.
Principal point involved: Complainant contended "display lugs" ordered and "suitcase boxes" delivered.
Order: Case dismissed.

Outline of Facts

Complainant alleged that he spoke to William J. Kelly of C.H. Robinson Co., and asked him if he had any Italian prunes in display lugs for sale, and Kelly replied that he had a carload of Washington Italian prunes owned by respondent, packed in display lugs, being U.S. #1 grade, with the exception of 100 lugs, which were graded unclassified; that complainant also informed Mr. Kelly that he wanted the packages to weigh 16 lbs., be "cleated" so that the fruit would bulge on the sides, and to be labeled "Evergreen Brand", at the agreed price of 42½¢ f.o.b. shipping point, per lug; that the broker furnished complainant and respondent with a memorandum of sale, setting forth all the terms as agreed to; that the prunes arrived in New York City at 1:00 A.M. August 9, 1934, and were inspected by a Federal inspector; that the draft was paid by complainant on or about August 5, 1934, prior to the arrival of the prunes in New York City; that the package known as a display lug is smaller than the suitcase box, and is more desirable in the trade as it has a higher pack, due to the "cleats", bringing a higher price; that complainant had the prunes originally listed for auction sale as display lugs, but was compelled to change the designation to suitcase boxes, after seeing the prunes unloaded; that respondent knowingly shipped suitcase boxes instead of display lugs, contrary to the provisions of the contract; that Thomas F. Wilcon & Company sold Italian prunes in display lugs on the same day that the prunes in this car were sold through the New York Fruit Auction Corp. and received 85¢ a package, whereas the prunes in question brought 70¢ a package for those classified, and 65¢ a package for the unclassified; and that there is now due claimant the sum of $306.12.

The respondent contended that the prunes were shipped prior to the receipt of the order from the broker, and that diversion was accepted by the broker without any requirement that the prunes be shipped in display lugs, and without reference thereto, other than the inquiry as to whether the prunes were shipped in display lugs, and that the prunes were shipped in display lugs.

Ruling included in Decision

The evidence was conflicting as to whether the prunes were shipped in display lugs, and this was probably due to the fact that there is much confusion as to just what is a display lug, this term having no standard meaning. Apparently the lugs were considered display lugs at point of shipment, and suitcase boxes or lugs at point of destination. Following the words "display lugs" on the broker's memorandum of sale was the following definition in question marks: "LIDS CLEATED SO FRUIT BULGES WELL ABOVE SIDES". The weight of the evidence showed that the prunes were shipped in accordance with the description given in the standard memorandum of sale, and the complaint was therefore dismissed.

S-1088, September 3, 1935, Docket 1712: (S.P.)

O.J. BARNES COMPANY, EAST GRAND FORKS, MINN. vs. EAKIN & CO., MISSOURI VALLEY, IOWA.

Violation charged: Rejection
Principal points involved: When prospective buyer requests shipper to "stop" a car it is for purpose of inspection; if a buyer directs seller to "ship" a car it is equivalent to an order for the car.
Order: Case dismissed.

Outline of Facts

Negotiations were commenced between complainant and respondent concerning the proposed sale and purchase of two carloads of "fine U.S. No. 1 potatoes". Respondent wired complainant "STOP ONE THOSE LARGE RIPE UNITED STATES NUMBER ONE OHIOS". When the car arrived respondent inspected and wired complainant "CAR BAD BEEN FROZEN WOULD HAVE TO ASSORT HOW ABOUT CAR HALF HALF". Three days previous to the arrival of that car respondent wired complainant "STOP CAR OF HALF COBBLER AND HALF OHIOS". This car arrived at Missouri Valley two days after the first car and was also refused by respondent as not being No. 1 potatoes. Complainant contended that the shipper ordered the cars when he wired "stop" cars; that Federal inspection showed the cars graded U.S. No. 1; that they were resold as U.S. No. 1 and accepted as such and that respondent's refusal to accept the cars was a rejection without reasonable cause.

Respondent contended that he did not purchase the potatoes but merely requested the complainant to stop the cars for inspection; that the potatoes had been frozen in some degree and the fact that they were resold as U.S.No. 1 potatoes was no evidence that they were not in the condition as stated by respondent.

Rulings included in Decision

1. Unless a work has a technical meaning recognized in the trade its well known ordinary meaning should be adopted. The complainant in substance contends that "stop" is equivalent to or synonymous with "ship". The dictionaries define the two words entirely differently, and in the produce business when a prospective buyer requests a shipper to stop a car it is for the purpose of inspection. On the other hand, if a buyer directs the seller to ship a car it is equivalent to an order for a car. Respondent did not order or purchase either or both cars of potatoes when he requested that one of them be stopped.

2. The evidence discloses that as soon as the first car arrived, which was on the morning of October 15, the respondent inspected the potatoes and considered that they had been frozen. Evidence as to what was the extent of the freezing injury is conflicting. The evidence showed, however, that it was not a fine car of U.S. No. 1 potatoes and notice was given well within the twenty-four hour period.

3. The evidence does not show that the respondent purchased either car of potatoes, that the potatoes graded fine U.S. No. 1, or that the refusal of the potatoes was more than twenty-four hours after respondent was notified of their arrival. For these reasons the complaint should be dismissed.

S-1089, September 3, 1935, Docket 1584: (S.P.)

CONSOLIDATED PRODUCE COMPANY, Ltd., LOS ANGELES, CALIF. vs. DALLAS FRUIT & VEGETABLE COMPANY, DALLAS, TEXAS.

Violation charged: Rejection
Principal point involved: Complainant failed to prove case.
Order: Case dismissed.

Outline of Facts

Complainant alleged that on July 27, 1934, by oral contract, it sold to respondent one car of No. 2 tomatoes, PFE 33358, at $1.20 per box f.o.b. Chula Vista, Calif. or a total price of $720; that the tomatoes were inspected at Chula Vista and accepted by respondent while they were being loaded on July 27; that there was no certificate of inspection obtained by the respondent; that the sale was negotiated by complainant through its agent at Chula Vista; that respondent rejected the car without reasonable cause.

Respondent contended that he was not in Chula Vista on July 27, 1934 and submitted evidence in support of this fact, and did not contract to buy any tomatoes from the complainant or from anyone else in California on this date; that on July 28 about 5:30 or 6:00 p.m. respondent (while in the railway yards of the Southern Pacific at Chula Vista,) asked Mr. George Kohnhorst (agent of complainant) if he had any tomatoes to sell for "today's shipment", July 28; that Kohnhorst said he did not, stating that the car that had just been loaded was a car of U.S. 2 tomatoes that had been sold; that the car referred to was PFE 33358; that Kohnhorst informed respondent that he would have a good car of tomatoes which he would load Monday which he thought respondent might be able to buy at a price of around $1.35; that this concluded the conversation and dealing on July 28, and respondent did not even look inside of the loaded car PFE 33358; that respondent did not inspect any car on July 27 as he was not in Chula Vista on that date; that respondent telegraphed his firm in Dallas on July 28 that he was unable to buy any tomatoes on that date; that on July 30, 1934, at a place described to respondent as "The Flax Seed Shed", about five miles south of Chula Vista about 12 o'clock respondent was advised by Kohnhorst that the car which he had rolled Saturday, July 28, was unsold and that respondent could buy it at $1.20 f.o.b.; that respondent agreed to purchase the tomatoes at $1.20 per lug provided they would grade U.S. No. 2, and Kohnhorst agreed to this; that respondent refused the car on arrival at Dallas, Texas, because it did not grade U.S. No. 2 as shown by the Federal inspection certificate, and the complainant was promptly advised.

The evidence in the case was conflicting. The complainant insisted that the contract (oral) called for a car of No. 2 tomatoes but in proof of this contention apparently relied on a sales ticket, an invoice, an unsworn statement by a representative of a shook company and a sworn statement by the foreman of the packing shed. The respondent contended that the tomatoes were to be U.S. No. 2. The term "U.S. No. 2" is definite and generally understood but what the complainant meant by "No. 2" as distinguished from U.S. No. 2 is not known. Complainant submitted several telegrams in support of its contention that the car was bought on July 27 and was to be No. 2. The first telegram submitted was dated July 30, 1934 and was sent in the afternoon by Geo. A. Kohnhorst to the complainant and dealt with the routing of the car. If complainant's contention is correct that the car was inspected and sold on or about July 27, it is not clear why it waited until the afternoon of July 30 before sending the first telegram pertaining to the matter. The Federal inspection certificate dated August 2, 1934 at 11:00 a.m. clearly showed that the tomatoes were not U.S. No. 2.

Ruling included in Decision

As indicated above, complainant failed to establish by a fair preponderance of the evidence that rejection of the tomatoes by respondent was without reasonable cause.

S-1092, September 3, 1935, Dockets 1562 and 1567: (Hearing)

J.G. KOLE, LOS ANGELES, CALIF. vs. JOHN A. DUNCAN, RECEIVER FOR MOTOR CITY PRODUCE CO., DETROIT, MICH. and COUNTERCOMPLAINT.

Violation charged: Failure to account.
Principal point involved: Joint account agreement.
Order: Reparation awarded respondent in the sum of $594.83, with interest.

Outline of Facts

J.G. Kole will be referred to as complainant and the Motor City Produce Co. as respondent.

Complainant and respondent entered into a joint account agreement whereby complainant undertook and agreed to purchase cauliflower and cantaloupes at loading points in the State of California and ship same to respondent at Detroit, Mich. there to be sold by respondent after paying complainant the original cost thereof.

In the months of April and May, 1934, in pursuance of the joint account agreement, complainant purchased for handling and sale by respondent, 8 carloads of cantaloupes and one car of cauliflower. Respondent accepted the cauliflower, which had been shipped from California, and paid complainant the original cost thereof in the form of drafts drawn by complainant upon respondent. Respondent also paid the transportation charges upon each carload and sold the cantaloupes and cauliflower for the joint account. The total amount paid by respondent exceeded the net receipts in the amount of $2,870.56. According to the terms of the joint account agreement each of the parties was to bear one-half of the net loss. The respondent demanded of complainant the payment of his half share but the latter refused, thereby owing respondent the sum of $1,435.28.

In further pursuance of the joint account agreement complainant shipped respondent 6 carloads of cantaloupes. Complainant had purchased the cantaloupes for the total sum of $2,240.45. Upon arrival of the cars in Detroit respondent refused to pay complainant's drafts representing the original cost of the cars and thereafter complainant caused the cars to be forwarded to New York City in an effort to make resale at that market, and minimize the loss to the greatest extent possible, but the cantaloupes were abandoned to the railraod company. Thereafter complainant secured from the Wabash Railway Company, in settlement of claims filed against the carrier, based upon the latter's failure to notify the complainant of the non-delivery of the last six cars of cantaloupes mentioned above, the sum of $1,600, but paid as a collection fee to the Associated Traffic Managers the sum of $400, making the amount of the net return $1,200. At the time of the hearing there remained due and owing complainant from respondent, in connection with the joint account handling of the last six cars above mentioned, the sum of $640.45 plus one-half of the $400 collection charge, making a total of $840.45.

In connection with the last six cars the respondent contended that in no event could reparation be ordered in complainant's favor for more than half of the net loss.

At the hearing respondent moved that the name of respondent in Docket No. 1562 and complainant in Docket 1567 be changed to "John A. Duncan, Receiver for the Motor City Produce Co.", which motion was granted.

Rulings included in Decision

As respondent's obligation under the joint account agreement was to pay complainant the full original cost of the cantaloupes, represented by the drafts drawn by complainant, and it further agreed to accept them and offer the stock for sale, which respondent failed to do, it would appear that complainant is legally entitled to recover his actual losses. The situation would, of course, be different if respondent had performed and a loss had been incurred. In such case the parties would be required to share the losses. But in the instant case respondent first breached the agreement by its failure to pay the original cost of the cantaloupes. It further appears that complainant paid the Associated Traffic Managers a fee of 25% from the $1,600 secured from the Wabash Railway Company. As this expenditure is in the nature of an expense item and was paid for services rendered both parties to the joint account agreement, they would each be required to assume one-half of such $400 item, the effect of which will be to increase complainant's net claim to a total of $840.45.

The net result of admissions made by the parties in their pleadings, supplemented by respondent's stipulations entered on the record at the hearing leaves little to determine as issues of fact. The amount of $840.45 found to be due and owing complainant should be deducted from the amount of $1,435.28 which complainant concedes to respondent in its counter-complaint. Hence, an order in respondent's favor should be entered in the sum of the difference, or $594.83, with interest.

S-1093, Sept. 16, 1935, Docket 1802: (S.P.)

SAMUEL J. SHALLOW CO., BOSTON, MASS. vs. P. EHRLICH, LOS ANGELES, CALIF.

Violation charged: Failure to deliver.
Principal point involved: Seller complied with specifications of contract and was not responsible in f.o.b. sale for damage due to lack of ice or rough handling in transit.
Order: Dismissed.

Outline of Facts

Complainant alleged that it bought from respondent by oral contract one carload of U.S. #1 Cannonball cabbage, medium size, solid and green, at the agreed price of $1.25 a crate, f.o.b., top ice extra, making a total sale price of $393.75; that the amount of ice was not specified but was left to the discretion of the shipper to carry properly the cabbage to destination; that upon arrival at destination the cabbage failed to meet the contract specifications and complainant was damaged in the sum of $268.96, being the difference between what the cabbage would have been worth had it met the specifications of the contract and the market value of the cabbage actually delivered; and that complainant received an invoice from the respondent with a demand draft in the sum of $381.06, which was paid by complainant on January 30, 1935.

The evidence in the case was very conflicting as the contract was an oral one. Respondent was emphatic in his denial that the cabbage was to be US #1, but stated that he contracted to sell complainant a car of fresh green cabbage, which was done; that the cabbage was sold on the basis of $25 per ton, and not $1.25 per crate and that 9600 pounds of top ice were placed on the cabbage; that complainant knew the date the car was shipped and, had it desired, could have protected its property by having the cabbage top-iced in transit; and that 9600 pounds were the maximum amount of ice that could be placed over the top of the cabbage inside the car.

The telegrams exchanged between the parties did not state that the cabbage was to be U.S. #1. The complainant relied largely upon the inspection made at Boston by the Binney Inspection Service. This inspection clearly indicated that the condition of the cabbage on arrival was due to lack of ice and rough handling while in transit.

Rulings included in Decision

1. This was an f.o.b. sale Los Angeles and the respondent was not responsible for damage to the cabbage due either to lack of ice or rough handling in transit. It is true that the respondent agreed to top ice the cabbage at Los Angeles, and he complied with the agreement when he placed 9600 pounds of ice on the cabbage.

2. Complainant failed to establish by the evidence that the respondent did not comply with the contract of sale, and the case was dismissed.

S-1098, Sept. 16, 1935, Docket 1637: (Hearing)

C. R. VON KESLER, CHICAGO, ILL. vs. DEWEY E. KLEIN SALES CO., CHICAGO, ILL.

Violation charged: Failure to account.
Principal points involved: Burden of proof on complainant; complainant's letters after controversy arose not evidence.
Order: Reparation awarded complainant in the sum of $255.71, with interest only from date of service.

Outline of Facts

Complainant alleges that on August 3, 1934 he sold respondent 100 cans of red raspberries at a Chicago delivered price of 9¢ per pound or $270 and that on August 29 he sold respondent another lot of 100 cans of berries at 7¼¢ per pound "f.o.b. Pacific Coast" or a total of $217.50 plus "pro-rata freight, handling and distributing charges" in the sum of $38.21 and an "item of $15 carrying charges on the Pacific Coast", this making the total sale price and charges for the two lots $540.71; that a payment was made by the respondent on the second purchase of $255.71 leaving unpaid on both transactions a total of $285 which he claimed as damages.

Respondent claimed that it was authorized to reduce the invoice on the first purchase to $217.50 and to pay the storage company the item of $38.21 which it did, and that it tendered a payment of $255.17 on the second purchase which payment complainant refused. Respondent denied, however, that anything was said as to the payment of warehouse storage charges at shipping point assessed at $15 on the second lot.

The points in dispute were whether the original selling price of the first purchase had been reduced from $270 to $217.50 and whether the above mentioned warehouse charge of $15 was a part of the contract.

Rulings included in Decision

1. The first lot was billed on the basis of a Chicago delivered price. No custom or prior purchases upon the terms which complainant contends respondent must have "understood" being shown, complainant is compelled to rest his case upon an expressed oral contract to that effect. As to the establishment of such an agreement complainant has the burden of proof. The evidence is directly conflicting. Complainant's letters written after the controversy arose are not considered as evidence corroborating his claim as to what the contract was. Under these circumstances it is concluded that the complainant has failed to meet the burden of proof rule and that a reparation order in complainant's favor should be limited to the amount of $255.71, which respondent admits owing.

S-1101, Sept. 18, 1935, Docket 1749: (S.P.)

C.H. ROBINSON COMPANY, MINNEAPOLIS, MINN., vs W.A. BROCK & SON, ELIZABETH CITY, N.C.

Violation charged: Failure to account.
Principal point involved: Respondent's calimed set-off not justified.
Order: Reparation awarded complainant in the sum of $255, with interest.

Outline of Facts

Complainant, acting as respondent's broker, negotiated the sale of eighteen carloads of potatoes for and on behalf of respondent. The agreed and reasonable brokerage charge for such services was $255, but respondent refused to pay the brokerage, claiming a set-off of $148.80 from a previous transaction. Respondent alleged that complainant, acting as respondent's agent, sold two carloads of potatoes to the Taylor Produce Co. of Cleveland, Ohio, at a delivered price of $2.50 per barrel, which price was "guaranteed against decline" to and including June 22, the sale having been made on June 19; that complainant wired respondent on June 22 that other sales had been made that day at $2.10; that acting upon such wire, respondent mailed to complainant his check for $148.10, which was delivered by complainant to the Taylor Produce Company; that this refund had the effect of reducing the sale price of the two carload shipments from the Cleveland delivered price of $2.50 to $2.10 per barrel; that respondent furnished U.S. #1 stock and that the sales reported by complainant were for off-grade stock; that complainant therefore made a false and misleading statement to respondent's loss in the amount of the price reduction made. The evidence showed that respondent's ultimate allowance of $148.80 to the Taylor Produce Co. was a voluntary payment, and was made after being correctly informed as to the facts.

Ruling included in Decision

Respondent's claim of $148.80 against complainant must be denied, and reparation awarded complainant in the sum of $255, with interest.

S-1103, Sept. 18, 1935, Docket 1810: (S.P.)

GEO. H. STONE & SONS, FT. FAIRFIELD, MAINE, vs. HOUSTON PRODUCE CO. HOUSTON, TEXAS.

Violation charged: Rejection.
Principal point involved: On delivered sale seller failed to prove that produce met terms of contract upon arrival.
Order: Case dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of a carload of U.S. #1 potatoes at $1.08 per hundred, delivered, to be shipped from St. Luce, Maine to Houston, Texas. The potatoes met the terms of the contract of sale at shipping point according to Federal inspection. Respondent rejected the car upon arrival, stating that upon inspection of the potatoes it developed they had sprouts, and there were a number of spotted bags. Respondent was willing to take the potatoes if afforded protection against loss on account of the spotted bags, which offer was refused. The potatoes were "picked over" on March 15, and it developed that there were 34 sacks of potatoes that could not be used, and for the loss and expense in connection with the 34 bags respondent denied any liability but stated that without prejudice to respondent he was willing to pay $24.80. Respondent accepted 56 sacks of potatoes from the broker and paid the contract price thereof. No Federal inspection was made at Houston.

Complainant contended that respondent rejected the car because of lack of funds, that the potatoes met the terms of the contract at Houston and that complainant was entitled to damages in the difference between the original contract price and the amount received upon resale, or $116.01.

Ruling included in Decision

It is incumbent upon complainant to show that the potatoes were U.S. #1 upon arrival at Houston, and the complainant failed to do this. It apparently relied upon the Federal-State inspection made at St. Luce, Maine, at which time only 4% defects showed, and the potatoes were therefore then within tolerance for U.S. #1, but it does not follow that there were not defects in excess of tolerance upon arrival at Houston.

S-1106, Sept. 20, 1935, Docket 1745: (Hearing)

FLORIDA EAST COAST GROWERS ASSN. INC., MIAMI, FLORIDA, vs. GARRETT-HOLMES & CO., KANSAS CITY, MO.

Violation charged: Failure to account.
Principal point involved: Subsequent contract made and buyer complied with agreement when he accounted on basis of that contract rather than on basis of the original contract which was later changed.
Order: Case dismissed.

Outline of Facts

Respondent contracted to purchase from complainant a carload of 823 lugs of Florida tomatoes consisting of 322 lugs of 6x6s at $2.50 per lug and 501 lugs of 6x7s at $2.00 per lug all f.o.b. Florida shipping point. On arrival at destination respondent immediately complained of the quality of the tomatoes and the broker arranged with complainant for respondent to dispose of the shipment upon the condition as set out in complainant's wire, the material part of which was "keep track of lugs and let us know which numbers running bad and will make best settlement possible." The broker advised complainant by wire that respondent was unlaoding the tomatoes "keeping check" on the poor quality tomatoes and would expect complainant to protect respondent "on these poor lines" to which complainant failed to reply and respondent, aided by two other dealers in Kansas City, repacked and sold all salable tomatoes as rapidly as they ripened. All the tomatoes were thus finally disposed of in accordance with the subsequent agreement and an accounting was rendered by respondent on January 17, 1935, showing a balance due complainant of $791.91 which sum complainant admitted having received.

Complainant contended that there was owing to it from respondent, based upon the original transaction, the additional sum of $992.59, which was the difference between the $791.91 remitted by respondent and the original sale price of $1807 less an allowance of $22.50 or $1784.50.

Rulings included in Decision

1. The claim was based upon the original transaction which was supplemented by the subsequent agreement permitting respondent to dispose of the tomatoes following which "the best settlement possible" would be made. It was impossible therefore to say wherein respondent had taken any unfair advantage of complainant in this case and for this reason the record failed to disclose that any sum whatever was due and owing from respondent to complainant.

2. Respondent's failure to pay to complainant the total contract purchase price for the tomatoes did not constitute a violation of the Act, but on the contrary was warranted by the terms of the modified agreement of the parties.

S-1109, Sept. 21, 1935, Docket 1534: (S.P.)

PRODUCERS SERVICE CORPORATION, LAREDO, TEXAS, vs. FLATOW, RILEY & COMPANY, CINCINNATI, OHIO.

Violation charged: Failure to account.
Principal point involved: Buyer not justified in deducting set-off on car shipped on consignment against a car sold outright and not consigned.
Order: Reparation awarded complainant in the sum of $98.69, with interest.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of a carload of cabbage containing 560 half crates at 60¢ per half crate, f.o.b. Mission, Texas, plus $25 for top ice, or a total of $361, for shipment to Cincinnati. The evidence in the case showed that top ice was applied to the cabbage at shipping point and the cabbage conformed to the specifications of the contract of sale. The respondent paid the complainant the purchase price of the cabbage but later deducted $110.69 from the net sales of a car of mixed vegetables which had been shipped by complainant to respondent on consignment, contending that the cabbage was not iced at shipping point, resulting in the cabbage arriving in poor condition, thereby causing a loss in the above amount. There was a decline in the market price of cabbage after its arrival in Cincinnati. The account of sales rendered by respondent dated February 17, 1934, showed that all of the cabbage sold between 90¢ and $1.15 which was within the market price for cabbage in half crates at Cincinnati between January 27 and February 3. The car arrived in Cincinnati on January 27.

Rulings included in Decision

1. The loss in the cabbage sustained by respondent was due to the decline in the market and not due to the condition or quality of the cabbage. As this was a purchase and sale f.o.b. Mission, Texas, the respondent should bear the loss of any decline in the market price.

2. The respondent was not justified in deducting any amount as a set-off on the mixed car of vegetables shipped on consignment against a car of cabbage which had been sold by complainant to respondent and not consigned.

3. The complainant agreed to pay respondent for the ice applied to the cabbage at Cincinnati, amounting to $12, and due to this agreement respondent was authorized to deduct $12 in accounting to the complainant. Reparation was therefore awarded complainant in the sum of $98.69, with interest.

COMPLAINANTS (Hearing)

S-1112, Oct. 9, 1935, Docket 1898: M.F. BYLES, PERRINE, FLA.
S-1114, Oct. 10, 1935, Docket 1859: M.M. HOGAN, JACKSONVILLE, FLA.
S-1116, Oct. 10, 1935, Docket 1860: DOVE ORCHARD CO., CLOVERDALE, VA.
S-1118, Oct. 15, 1935, Docket 1887: HUNGERFORD SUPPLY COMPANY, HUNGERFORD, PA.
S-1119, Oct. 15, 1935, Docket 1904: RED APPLE ORCHARD, INC., SHIPMAN, VA.
S-1120, Oct. 15, 1935, Docket 1858: MONITOR FRUIT COMPANY, MONITOR, WASH.
S-1121, Oct. 15, 1935, Docket 1893: HOWARD C. HARTMAN, LYNNPORT, PA.
S-1122, Oct. 15, 1935, Docket 1863: P. A. CYR, GRAND ISLE, MAINE.
S-1123, Oct. 15, 1935, Docket 1888: INDEPENDENT FRUIT SHIPPERS, WENATCHEE, WASH.
S-1126, Oct. 15, 1935, Docket 1862: Isaie L. Cyr, MADAWASKA, MAINE.
S-1127, Oct. 18, 1935, Docket 1896: FLORIDA EAST COAST GROWERS ASSN., MIAMI, FLA.
S-1128, Oct. 18, 1935, Docket 1861: WILLIAM H. BOAZ, COVESVILLE, VA.
S-1129, Oct. 18, 1935, Docket 1902: CHARLES F. ASPER, ASPERS, PA.
S-1181, Dec. 24, 1935, Docket 1940: H.L. GOODRICH, PALMYRA, MAINE.

RESPONDENT: NATIONAL COMMISSION DISTRIBUTING CORPORATION, WASHINGTON, D.C.

Violation charged: Failure to account.

Principal point involved: Respondent's failure to remit proceeds of sale of goods handled on consignment.

Orders: Reparations awarded as follows:

M.F. Byles,	$25.62, with int. from	May 15,1935
M.M. Hogan,	415.93, " " "	Apr. 5,1935
Dove Orchard Co.	441.28, " " "	" 1,1935
Hungerford Supply Co.	200.00, " " "	Mar. 1,1935
Red Apple Orchard, Inc.	1318.07, " " "	May 1,1935
Monitor Fruit Co.	1222.36, " " "	Mar. 1,1935
Howard C. Hartman	200.00, " " "	Mar. 1,1935
P.A. Cyr	228.54, " " "	Feb.10,1935
Independent Fruit Shippers	451.32, " " "	Mar. 1,1935
Isaie L. Cyr	156.77, " " "	Apr. 1,1935
Florida East Coast Growers Assn.	1687.16, " " "	May 1,1935
William H. Boaz	424.17, " " "	Apr. 1,1935
Charles F. Asper	200.00, " " "	Dec. 1, 1934
H.L. Goodrich	146.34, " " "	Apr. 1,1935

Outline of Facts

During the fall of 1934, the spring of 1935, and the intervening months the above-named complainants shipped produce to respondent in interstate commerce for sale on consignment. The respondent received the produce and sold it for the accounts of the complainants but thereafter failed, neglected and refused to account to and pay complainants the full net proceeds thereof.

Complaints were filed with the U.S. Department of Agriculture and an investigator from the Bureau of Agricultural Economics determined from respondent's records that the net proceeds received by respondent from the sale of the produce and still remaining due the complainants were as shown above under the heading "Order."

Respondent failed to file answers to the complaints or to appear at the hearing of these complaints and the disciplinary complaint of H.A. Spilman, an employee of the U.S. Department of Agriculture, when it was brought out that although the name of W.E. Burton did not appear on the application of respondent for license, nevertheless he was the managing head of respondent's business and that he was wholly responsible for the conduct of the respondent in the transactions herein described.

Ruling included in Decision

Respondent's failure to account and remit to the complainants the full net proceeds of the sales of the produce shipped on consignment was in violation of the Act and reparations were awarded the complainants as shown above under the heading "Order."

S-1117-A, Dec. 19, 1935, Docket 1813:

SCRANTON PRODUCE COMPANY, SCRANTON, PA. v. JOHN J. LANE, BOSTON, MASS.

Violation charged: Failure to deliver was the charge in original complaint.
Principal points involved: Specification "Maine Commercial potatoes" reasonably interpreted to refer to U.S. Commercial grade.
Order: Petition for rehearing overruled and denied; reparation awarded by order of Oct. 10, 1935 payable within thirty days from the date of this order.

Outline of Facts

A petition for rehearing in this case was filed by respondent, who claimed that the contract was for a carload of "Maine Commercial potatoes showing surface scab" and not for a carload of U.S. Commercial potatoes; that the price at which the potatoes were offered by respondent should have indicated to complainant that they were not of the U.S. Commercial grade and that the mere mention of the fact that they showed surface scab indicated they were not U.S. Commercial; that the order issued in this case under date of October 10, 1935 was in error since the State of Maine did not officially adopt Federal standards for potatoes until March 15,1935, which was some time after the consummation of the contract here under consideration; and that even if such Federal standards had been officially adopted prior to the time of this transaction, that would not prohibit trading or shipping potatoes that did not comply with any or all of the grades established by the Department of Agriculture.

The decision in this case held that, since the State of Maine had previously adopted Federal grades, the complainant was warranted in interpreting respondent's telegram specifying "Maine Commercial potatoes showing surface scab" as meaning U.S. Commercial grade of potatoes from the State of Maine.

Federal inspection certificate issued at Scranton, Pa. on February 19, 1934 stated:

Quality: Stock is fairly clean and fairly bright. Grade defects range from 20% to 40%, averaging approximately 30% for the lot, consisting mostly of deep cuts, shatter bruises, second growth and deep pitted scab, of which 8% are below the requirements of U.S. No. 2 grade.

Condition: Stock when free from decay is firm. Decay ranges from 5% to 20%, averaging approximately 12% for the lot. Decay is Fusarium Tuber Rot (mostly Dry Type), generally following cuts and bruises; 4% of which is Fusarium Tuber Rot (Wet Type).

Grade: Fails to grade U.S. Commercial account of grade defects and decay noted above in excess of tolerance.

Rulings included in Decision

1. A specification of U.S. Commercial grade was not an unreasonable interpretation to place on the telegram mentioned above, since it is a known fact that the Division of Markets of the Maine State Department of Agriculture has used official U.S. grades for potatoes in all voluntary inspection work since some time in 1921, and Federal grades for potatoes were adopted as official State grades in 1928. With the passage of the Potato Branding Law, which became effective July 6, 1935, Federal grades became the basis for this branding law, the only exception being the provision for special State grades for seed potatoes. There was no proof that the trade generally recognizes unofficial trade terms as grades having no connection whatever with or reference to any particular State or Federal grades.

2. This shipment, as evidenced by the above-mentioned certificate, failed to meet the requirements of any known official or unofficial commercial grade of potatoes due to the high average percentage of decay, approximately one-third of which, or 4%, was of the Wet Type. The certificate of Federal inspection at destination did not mention surface scab, which respondent contends could have been present to an unlimited extent, but sets forth, in addition to Wet Rot, different and more serious defects such as Dry Rot, deep pitted scab, deep cuts, shatter bruises and second growth. The defects found by the Federal inspector were more serious than ordinary surface scab which was apparently contemplated by the parties because the defects noted by the inspector extend more deeply into the potato and cause considerable waste when preparing the potato for use. Complainant is entitled under any circumstances to insist on a substantial compliance with the terms of the contract as best it can be ascertained from the records as a whole.

S-1133, Oct. 22, 1935, Docket 1533: (S.P.)

HEIDNER & COMPANY, TACOMA, WASH. vs. SUNSET PRODUCE CO., SAN FRANCISCO, CALIF.

Violation charged: Failure to deliver.
Principal point involved: Failure to ship on boat which left before scheduled time does not constitute failure to deliver.
Order: Case dismissed.

Outline of Facts

A contract for purchase and sale was entered into between complainant and respondent under the terms of which the respondent agreed to deliver 300 boxes of oranges of specified sizes f.a.s. the steamer "Hindanger" sailing about July 9, 1934. At the time the contract was made neither party had any reason to believe that the "Hindanger" would sail prior to July 9, since it is customary for a boat to leave port on the Pacific Coast on or after the date announced for its departure. Because of a severe strike on the Pacific Coast the "Hindanger" left port under cover of darkness on July 3, six days earlier than the scheduled date.

Complainant alleged that the oranges were purchased for resale and export in fulfillment of a contract made on May 7, 1934 and that respondent failed to fulfill its contract for delivery of the oranges and therefore complainant was unable to fulfill its contract of sale with its foreign purchasers except by purchase of oranges in open market. Complainant therefore asked for damages in the amount of $255, the loss sustained by it through having been forced to purchase oranges in the open market. Respondent's answer to the complaint alleged that respondent had contracted to buy the oranges described in the contract and made arrangements to have the same picked, sorted and packed at the proper time for loading on the "Hindanger" on July 9; that respondent relied implicitly upon the statement of the complainant that the "Hindanger" would load about July 9 and that as soon as respondent learned that it would leave prior to July 9 respondent notified complainant by telegram that it would be impossible for respondent to ship the oranges on the "Hindanger" because of the change of the loading date from July 9 to July 5.

Ruling included in Decision

There was no breach of contract on the part of the respondent for the reason that the boat sailed six days prior to the date that complainant represented it would depart.

S-1134, Oct. 23, 1935, Dockets 1625, 1626, 1627, 1628, 1629: (S.P.)

NATIONAL COMMISSION DISTRIBUTING CORPORATION, WASHINGTON, D.C. v. J.C. BAUER, MERCEDES, TEXAS.

Violation charged: Failure to account for a deficit.
Principal point involved: Whether drafts were guarantees or accommodation advances.
Order: Case dismissed.

Outline of Facts

In June, 1934 respondent shipped to complainant five carloads of tomatoes to be sold on consignment. A draft was drawn on the complainant by the respondent in the sum of $350 on each of four cars and in the sum of $400 on one car. These were paid by complainant, who accepted delivery of the cars and sold the tomatoes for the account of respondent, claiming that it incurred a deficit on each car, the smallest being $196.67 and the largest $317.28. Complainant claims that the drafts drawn by respondent were accommodation advances.

Respondent alleged that complainant offered to guarantee 90¢ per lug f.o.b. Texas and in case the tomatoes brought more than 90¢ per lug after the cost of selling, freight, etc., it would remit the overage to respondent, and that the cars were shipped with assurance from complainant that they would bring a nice margin above the guaranteed advance, which only covered the cost of packing.

The evidence discloses that the first telegram between the parties was sent by complainant to respondent on June 3, 1934, asking for a car of good stock and stating it was "willing guarantee 90¢ benefit market." On the same day respondent replied that the car was out on the 2nd and for complainant to "wire me $400 cover cost packing." On June 4 complainant telegraphed respondent in part as follows: "NEVER BANK GUARANTEED ANYTHING OUR HISTORY BUT GET STARTED YOU HAVING HAMILTON NATIONAL WIRE YOUR BANK GUARANTEEING PAYMENT DRAFT WILL WORK WITH YOU CAR EVERY OTHER DAY***" On the same day respondent replied, in part: "YOU UNDERSTAND THE FOUR HUNDRED YOU ARE ADVANCING IS A GUARANTEED ADVANCE IN OTHER WORDS IF CAR FAILS TO BRING THE FOUR HUNDRED YOU HAVE NO RECOURSE ON ME**" Complainant promptly replied: "ANSWERING UNDERSTAND GUARANTEED ADVANCE ALREADY WIRED" On each of the invoices mailed at the time the cars were shipped the words "guaranteed advance" appear.

Ruling included in Decision

The drafts drawn on complainant by respondent were guaranteed and not accommodation advances. That complainant so considered them was indicated by a statement in complainant's letter of June 20 advising respondent "We will do our best and take our medicine if necessary." If complainant had regarded the drafts as accommodation advances complainant would not only have suffered no loss but would have received the 10% commission. The complaints for reparation were therefore dismissed.

S-1135, Oct. 23, 1935, Docket 1551: (Hearing)

GREGG MAXCY INC., SEBRING, FLA. v. JOHN GORMAN, BETHLEHEM, PA.

Violation charged: Rejection.
Principal points involved: Grade of oranges purchased; agency relationship of broker to respondent; cancellation of contract.
Order: Case dismissed.

Outline of Facts

Complainant sold to respondent, through the Sahmpanier Brokerage Co., Scranton, Pa., a carload of Florida oranges at $1.15 per bag of one-half box each, delivered at Bethlehem, Pa. The oranges tendered respondent by complainant graded U.S. No. 1 Russet and U.S. No. 2, as evidenced by Federal shipping point inspection certificate, and were rejected by respondent as not being up to contract specifications. Complainant then resold the car for respondent's account through the Kennedy Fruit & Vegetable Co., Inc., of Rochester, N.Y. at an alleged loss of $504.58, which amount it sought to recover.

Respondent denied that complainant sold the oranges here involved to respondent as alleged by complainant, stating that objection was made upon receipt of memorandum of sale issued by the broker because it specified that a substantial portion of the shipment to be U.S. No. 2 grade which respondent did not order or want, and the broker suggested that "respondent await the arrival of the car, when he would make an adjustment on the No. 2 grade if the contents of the car were not satisfactory;" and alleged that on arrival many of the oranges were crushed and some decay was apparent.

Complainant's salesman and Assistant Secretary testified by deposition that inspection at final destination showed "26 sacks next floor racks showed six to twelve oranges per sack crushed by weight of load above and an average of 3% in two upper layers showed decay." Deposition of a member of the firm of Kennedy Fruit and Vegetable Co. stated that when WFE 66191 was received by them 26 bags were found in bad order.

Deposition of the proprietor of the brokerage company stated that he represented complainant and sold for the account of complainant to respondent a carload of Florida oranges consisting of No. 1 Bronze and Leader choice brands, half boxes in bags, at $1.15 per bag delivered Bethlehem shipped in car WFE 66191; that when the car arrived at Bethlehem respondent phoned the broker he was rejecting it on account of bottom tiers of fruit crushed and stated the sizes were irregular and that the count was running short and demanded 30¢ per bag allowance, and this information was transmitted by the broker to the complainant.

At the hearing respondent moved to dismiss the complaint because the broker acted as agent for complainant only and in no way represented respondent in this transaction, supporting this position by reference to the broker's deposition and the broker's standard memorandum of sale signed only by "Shampanier, broker."

Rulings included in Decision

1. Respondent contracted for the purchase of U.S. No. 1 Florida oranges.

2. While it has been conceded that the broker was the agent of complainant only up to the time of presenting the memorandum of sale to respondent, nevertheless there was nothing to prevent respondent from accepting the same broker as his agent and it has been consistently held that such is the result of the failure of respondent to complain within twenty-four hours concerning the terms or specifications as stated in the broker's memorandum of sale, which after all is not the contract but merely evidence of it although it must be considered as correctly interpreting the agreement unless promptly objected to.

3. Immediately upon receipt of the standard memorandum of sale respondent abrogated the contract by making telephonic objection to the mention of two grades in the memorandum of sale, the broker having guaranteed that each bag would contain one-half box of U.S. No. 1 oranges. The record stood undisputed to the effect that the oranges were not U.S. No. 1 on arrival at destination and respondent produced several witnesses to testify that the bags did not hold half a box.

4. Complainant failed to establish a case and the complaint was therefore dismissed.

S-1140, Oct. 23, 1935, Docket 1703: (S.P.)

VINCENT FAMULARO, DOING BUSINESS AS V. FAMULARO & SONS, DENVER, COLO. v. J.P. GRAY, NAMPA, IDAHO.

Violation charged: Failure to ship a carload of apples conforming to the contract of sale specifications.
Principal points involved: Condition of the apples upon arrival at destination; proof of loss.
Order: Dismissed.

Outline of Facts

On or about February 28, 1933 complainant and respondent entered into a written contract for the purchase and sale of a carload of Rome Beauty apples to be shipped from Idaho at the agreed price of $1.10 per bushel f.o.b. Denver. The apples arrived at Denver on the morning of March 4, 1933 and a draft was drawn by respondent on complainant for the amount of the purchase price after deducting the freight, and this draft was promptly paid by complainant. A doorway inspection was made on the same day, but no objection to the apples was made until unloading was begun on March 6.

Complainant alleged he had no opportunity to inspect the apples until arrival at Denver, that they were received in a damaged condition due to bruising and heavy freezing injury and therefore were not of the market value they would have been had they met the specifications of the contract, which caused complainant to suffer a loss of $165.10. Respondent denied that the apples were received in a damaged condition due to bruising or were frozen in transit, there having been no extreme temperatures between Kuna, Idaho and Denver, Colorado while the car was moving, but stated that the temperature was below freezing at Denver after the apples arrived and while the car was on track.

Federal inspection certificate issued at Denver on March 6 stated under "Condition": "Stock generally ripe, few ripe and firm. No decay. Stock in baskets in bottom and second layers and in baskets in third layer next side walls in first, second and third stacks from gangway show conditions characteristic of freezing injury." The temperature there on March 6 was 23° and during the preceding twenty-four hours had registered 20°. There is evidence that there were some frozen apples at 12:30 P.M. on March 6 but there is no evidence that the apples were frozen on the morning of March 4, when they arrived at Denver. The Federal inspection certificate showed no injury to apples due to bruising.

Rulings included in Decision

1. The evidence does not show that the apples did not conform to the specifications of the contract.

2. Complainant failed to show that he sustained any loss. The first sales of these apples on March 7 brought $1.20 per bu. or 10¢ more than the original contract price, while the sales from March 7 to March 17 ranged from $1.15 to $1.25 per bu. No proof was submitted in support of complainant's claim of an allowance of $27.15 made to his customers.

S-1141, October 23, 1935, Docket 1696: (S.P.)

STACY-VORWERK COMPANY, CHEYENNE, WYOMING, v. A. LEVY & J. ZENTNER COMPANY, SAN FRANCISCO, CALIFORNIA.

Violation charged: Failure to deliver.
Principal points involved: Failure to deliver constitutes breach of contract; measure of damages; insufficient proof of loss.
Order: Dismissed.

Outline of Facts

On May 24, 1934 complainant and respondent, through a broker, entered into a written contract for the purchase and sale of a carload of U. S. No. 1 Empire brand Valencia oranges at $2.75 delivered on 150's and larger and $3 delivered on 176's and smaller, to be shipped from Tulare County, Calif. on May 26 or 27, 1934 to complainant at Cheyenne, Wyoming, to arrive on or about May 29. On May 29 respondent advised the broker that the oranges could not be shipped as they did not grade U.S. No. 1 on account of drought.

Complainant alleged that, relying on the contract of purchase for replenishment, it allowed its stock of oranges to become depleted and upon learning of respondent's refusal to deliver was forced to purchase 375 boxes on May 26 at an f.o.b. cost of $3.693 per box and was forced to buy another car at $3.87 per box, thereby making the average replacement of the oranges in excess of $1 per box and causing complainant damage in the sum of $462.

Respondent denied that $462 represented the loss of complainant alleging that notice of respondent's failure to ship was given the broker on May 29 and therefore the purchase of 375 boxes of oranges on May 26 could not be based on the alleged breach of contract; that the purchase by complainant on June 4 was not made within a reasonable time after the breach of contract and that the oranges were Sunkist Valencias, a different size from those contracted for, which on May 29 and 31 sold in Denver at 50¢ per case above the price of Valencia U.S. No. 1 and other brands; that the damages should be based on grade and size; and that the reasonable market value on May 29 of similar kind and grade to the oranges contracted for was $2.75 for 150's and $3. for 176's and smaller, delivered. Respondent contended that Empire brand Valencia oranges are grown only in the vicinity of Woodlake, Calif. and that those oranges were so affected by drought that they did not grade U.S. No. 1 and that he therefore could not make delivery.

Complainant alleged that on May 29, immediately upon receipt of notification of refusal of respondent to deliver, complainant attempted to purchase a replacement car for immediate delivery but was informed no oranges were available and he could only obtain a car shipped from California that day. Due to steady increase in price of oranges at that time complainant could obtain no quotation but the price was to be fixed on delivery, and he sustained a loss of $1 per box, or $462.

Rulings included in Decision

1. Respondent breached the contract of purchase and sale through failing to make shipment. Respondent's contention that it was to furnish oranges from specified farms or districts, which was impossible because of drought, could not be sustained as the telegrams of May 24 and the memorandum of sale failed to so state.

2. Complainant failed to establish with reasonable certainty damages sustained and the amount thereof. The 375 boxes could not be considered as a measure of damages as they were purchased on May 26 before any breach of contract on the part of respondent. In attempting to establish damages on the carload purchased on June 4 complainant relied on an exhibit attached to the complaint which showed the sizes of the oranges to be materially different from those specified in the original contract. In addition, in its sworn statement complainant referred to "steady increase in price of oranges at the time (May 29)" and it was agreed that "the price to be fixed upon delivery (June 4)."

S-1147, Nov. 7, 1935, Docket 1720: (S.P.)

THE LAMB FRUIT COMPANY OF WASHINGTON, YAKIMA, WASHINGTON v. MINNEAPOLIS COLD STORAGE COMPANY, MINNEAPOLIS, MINN.

Violation charged: Rejection.
Principal point involved: Non-compliance of produce with contract specifications.
Order: Case dismissed.

Outline of Facts

Complainant and respondent, through a broker, entered into a contract for the purchase and sale of a carload of Orchard Run Faced and Filled Jonathan apples, approximately 35% of which were to be Extra Fancy and 50% Fancy, at 80¢ per box f.o.b. Imbler, Oregon. Upon arrival the apples were rejected by respondent who alleged they were shriveled and defective and therefore were not in suitable shipping condition, and that they were not of the kind, quality and grade called for in the contract. Complainant claimed damages of $312.74 resulting from resale at Kansas City, Mo. after rejection by respondent, which amount represented the difference between the amount for which the apples were sold to respondent and the amount realized by complainant from the resale.

The evidence disclosed that at the time of shipment the apples were inspected by a Federal-State inspector who certified under "Quality and Condition": *** "Tucker lot approximately 35% Extra Fancy, other lots approximately 30% Extra Fancy." They were also inspected at Minneapolis by a state inspector and it was found that 10% of the apples were shriveled. The deposition of the inspector of the Western Weighing and Inspection Bureau showed 3 to 20% of the apples shriveled.

Rulings included in Decision

1. The weight of the evidence sustained respondent's contention that the apples did not conform to the specifications of the contract of sale. The carload consisted of 756 boxes; 189 boxes were known as "Tucker lot", which contained approximately 35% Extra Fancy, while the remainder, consisting of 567 boxes, contained approximately 30% Extra Fancy. The Federal-State inspection certificate showed that there were not approximately 35% Extra Fancy when shipped and failed to show 50% were Fancy.

2. Respondent's rejection of the apples was not without reasonable cause for the reason that the apples did not conform to the specifications of the contract of sale. The case was therefore dismissed.

S-1148, Nov. 7,1935, Docket 1796: (S.P.)

M. KRAMER & SONS, CHICAGO, ILL. v. POTATO EXCHANGE, INC., DES MOINES, IOWA.

Violation charged: Failure to account.
Principal point involved: Whether the sale was "as is" or for No. 1 Grade.
Order: Case dismissed.

Outline of Facts

Through a broker, complainant purchased a half carload of onions from respondent at $1.20 per 50 lb. sack, delivered on track at Chicago. Complainant alleged that the broker represented the entire shipment as being No. 1 grade and that the onions in the doorway and on top of the load were No. 1 but the last 85 sacks taken from the bottom and the end of the car proved to be about 75% culls and No. 2 onions, which were of the value of only 35¢ per sack, causing complainant a loss of $72.05. Federal inspection obtained by complainant showed that 85 sacks did not grade No. 1.

Respondent contended that the broker had no authority to sell the onions upon any representation as to quality, grade or other designation and that they were in fact sold by the broker "as is." It alleged that complainant purchased the onions only after inspection and denied that they were loaded in any manner so as to deceive or mislead any person inspecting the car.

Rulings included in Decision

1. The onions sold by respondent to complainant were not represented to be of any quality or grade and were purchased at the agreed price of $1.20 per sack, including the 85 sacks which complainant alleged were of inferior quality. The offer of $1.20 per sack by complainant was accepted by the broker after the onions had been inspected by complainant. The broker stated that the onions were sold to complainant "on their own inspection after arrival of car on team track."

2. The onions purchased by complainant from respondent were paid for at the contract price and there was no breach of contract on the part of respondent; therefore the complaint was dismissed.

S-1153, Nov. 7, 1935, Docket 1547 & A: (Hearing)

B.C. CUMMINGS, MEMBER, AND IN BEHALF OF ALL OTHER MEMBERS OF THE MITCHELVILLE STRAWBERRY GROWERS ASSOCIATION, MITCHELVILLE, TENN. v. CITY PRODUCE & COMMISSION COMPANY, MANSFIELD, OHIO, AND COUNTER CLAIM.

Violation charged: Refusal by respondent to pay complainant the full purchase price of a shipment of strawberries.

Principal points involved: Car shipped one hour prior to completion of contract constituted today's shipment; respondent liable for purchase price of produce if it conformed to warranty; suitable shipping condition should assure delivery without abnormal deterioration at destination; prompt accounting constituted timely notice that produce failed to conform to warranty; cost of destination inspection not chargeable to shipper; buyer justified in offering actual value of produce not conforming to warranty.

Order: Reparation awarded complainant in the sum of $170.01, with interest; respondent's counter claim dismissed.

Outline of Facts

In the month of May, 1934 complainant sold to respondent a carload of U.S. No. 1 and U.S. No. 2 strawberries at $1.75 and $1.50 per crate, a total of $729, f.o.b. Mitchelville, Tenn. The berries were shipped and were accepted by respondent at Mansfield, Ohio, on May 22 and prompt sale was made for a total gross amount of $386.55. Respondent paid $216.54 freight and the cost of Government inspection in the sum of $12.60 and forwarded to complainant on account sales, together with a check for $157.41, which complainant later returned. Complainant contended respondent had failed, neglected and refused truly and correctly to account and pay the purchase price.

Respondent's counterclaim alleged that the strawberries were not of the quality and kind ordered; that in order to take care of respondent's orders it was necessary to purchase 128 crates of berries at Cleveland at a cost of $2.25 per crate and they paid an additional 40¢ per crate cartage; that in order to avoid a total loss the car was sold for the account of whom it may concern at a gross of $386.55. The proof showed that respondent on May 23 bought 118 crates of berries and on the same day also bought 70 crates. There was no proof that these purchases were necessary to make delivery on prior contracts or otherwise. Moreover, as late as June 1 respondent made no reference to these damage items and forwarded to complainant a check for $157.41.

Complainant contended that the purchase was made f.o.b. shipping point and that respondent therefore assumed all risks of transportation; but respondent claimed that the load was first consigned to Ferris Bros., Toledo, Ohio and was diverted to respondent at Louisville, Ky., and there appropriated to the contract, at which time the berries should have graded U.S. No. 1. Complainant also contended that respondent did not notify complainant within a reasonable time after respondent had unloaded and accepted the load as to the claimed breach of warranty as required by the Uniform Sales Act, which provides:

> "**if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

Federal inspection of the berries at Mitchelville, Tenn. May 19 showed 394 crates of U.S. No. 1 and 26 crates of U.S. No. 2. Federal inspection at Mansfield, Ohio on May 22, restricted to samples taken from the upper two layers, read as follows:

"From 15% in some crates to 80% in others (next bunkerwalls) mostly 15% to 20% of berries are soft, a few leaking in most crates, in a few crates most berries leaking. Decay varies from less than 1% in some crates to 10% in others, mostly less than 1% to 5%. Decay is mostly Leather Rot, some Rhizopus Rot accompanied by heavy growth of mold."

The inspector found that the berries then failed to grade U.S. No. 1 on account of the extent of soft berries and decay.

Rulings included in Decision

1. The car complied with contract specifications as to time of shipment. The broker's memorandum of sale provided for shipment by "freight today." The railroad agent testified that the car moved from shipping point May 19 at 5:25 P.M. consigned to Ferris Bros., Toledo, Ohio; that the original bill of lading was exchanged at 6:30 P.M. and a second bill of lading issued naming respondent as consignee. While the shipment appears to have been made approximately one hour prior to the completion of sale, nevertheless it was properly described as a shipment today as "today's shipment" is defined in the regulations. Respondent therefore assumed the risk of deterioration in transit if the berries were in fact in shipping condition at the time of sale.

2. Respondent having accepted the shipment, must pay the agreed purchase price unless complainant failed to deliver berries of the kind and quality warranted.

3. The berries were not in suitable shipping condition at the time and place of purchase to assure delivery without abnormal deterioration at destination and therefore failed to conform to complainant's warranty. A comparison of the shipping point and destination Federal inspection certificates shows that from 4:30 P.M. May 19, to 8:15 A.M. May 22, approximately two and one-half days, decay increased from less than 1% to as high as 10% in some crates "mostly less than 1% to 5%." The percentage of soft berries increased "mostly 15% to 20%" with some crates as high as 80% soft. The shipment moved under ice. The temperatures shown at both shipping point and destination were favorable.

4. Timely notice was given as to respondent's claim that the berries failed to conform to the warranty. This is indicated by respondent's letter of June 1 to the broker accompanied by an account sales and a check for $157.41 which the broker forwarded to the complainant, together with the testimony of a representative of the respondent company to the effect that he talked with a representative of the complainant company in Cleveland shortly after the check was received.

5. The cost of Federal inspection at Mansfield, Ohio is not a proper deductible item. Complainant secured a Federal inspection at shipping point to support the f.o.b. shipping point warranty. While the destination certificate was material on the question of suitable shipping condition, there was no obligation on complainant's part to either furnish it or pay the cost thereof.

6. Complainant's failure to furnish berries of the kind, quality and condition warranted justified respondent's offer to pay the actual value thereof. The record warranted the diminution of the purchase price of $729 to $157.41, for which amount a reparation order should be entered, but on account of respondent's tender of such amount no interest should be charged. Reparation (including inspection fee of $12.60) was awarded complainant in the sum of $170.01, with interest from the date of service of the order.

7. Respondent's counterclaim was dismissed.

S-1154, Nov. 14, 1935, Docket 1804: (Hearing)

PIOWATY BROS. INC., CHICAGO, ILL. v. W.H. J. KAVANAGH, CHICAGO, ILL.

Violation charged: Failure to account as guarantor.
Principal point involved: Agent not liable for purchase price of produce inspected and accepted for another with endorsement "accepted by W.H.J. Kavanagh" on draft.
Order: Complaint was dismissed.

Outline of Facts

As agent for the Motor City Produce Co., of Detroit, Mich., respondent purchased a carload of lettuce on track at Chicago, Ill. from complainant. The car was forwarded to the Motor City Produce Co. and respondent, as its agent, endorsed the draft representing the purchase price drawn by complainant on the said Motor City Produce Co. as follows: "Accepted by W.H.J. Kavanagh." Complainant contended that the Motor City Produce Co. accepted the lettuce but failed to pay for it and that thereafter complainant notified respondent that the car purchased by him had not been paid for and demanded payment but respondent also failed to make payment. The sum of $715.15 was claimed to be due.

Respondent's answer averred that in the transaction he acted as purchasing agent for the Motor City Produce Co. and was not liable as guarantor, or otherwise. He admitted that he inspected and accepted the lettuce for the Motor City Produce Co. and endorsed the draft drawn on the purchaser to that effect, but denied that he guaranteed the payment of the draft. Respondent testified that the placing of his name on the draft "signified to the Motor City Produce Co. when that draft is presented to them that Bill Kavanagh had inspected and accepted that car at Chicago for their account.

Ruling included in Decision

The record failed to support the allegations of the complainant and to establish a violation of the Act. Purchases of perishable commodities are commonly made by a buying broker upon his inspection of the commodity as agent for the purchaser. The record as a whole, and particularly the wording of the endorsements appearing on the draft and the accompanying invoice, failed to indicate that the parties intended respondent was guaranteeing the payment of the draft, but was considered fully consistent with respondent's claim that he simply inspected and accepted the lettuce as agent for the buyer. Neither the word "guarantee" nor other similar word or words appeared in the endorsement of the draft and the invoice bore the statement "inspected and accepted for your account by W.H.J. Kavanagh."

S-1158, Nov. 16, 1935, Docket 1853 & 1853-A: (S.P.)

THE RUBIN CO., CHICAGO, ILL. v. THE CASTELLINI CO., CINCINNATI, OHIO and COUNTERCOMPLAINT.

Violation charged: Rejection.
Principal points involved: U.S. No. 1 potatoes not necessarily "beautiful quality"; carrier and time specifications in contract must be complied with.
Order: Complaint was dismissed; countercomplaint was dismissed.

Outline of Facts

The complainant alleged that, through a broker, by contract in writing complainant sold to respondent one carload of U.S. No. 1 potatoes at the agreed price of $1.25 per cwt., delivered or $500; that when the potatoes were tendered to respondent at Cincinnati they were rejected and were then sold to another purchaser at a net of $400. Complainant therefore claimed damages in the sum of $100.

Respondent filed an answer and countercomplaint alleging that it purchased from complainant's agent one carload of Maine Red Spaulding potatoes, U.S. No. 1 grade, pale red "beautiful quality," at $1.25 per cwt. delivered, to be shipped Feb. 27 or 28, 1935 from Caribou, Maine, routed B. & O.; that on Feb. 28 complainant reconsigned from Chicago to respondent car of potatoes which had been originally shipped from Caribou on Feb. 12, routed Cleveland, Cincinnati, Chicago and St. Louis R.R. and that the potatoes were dirty, sprouty, poor grade, showing evidence of dry rot, and were rejected by respondent because they did not conform to the specifications of the contract. Damages of $100 were sought on the ground that respondend would have made a profit of that much had the potatoes conformed to the contract.

Upon arrival at Cincinnati the potatoes were inspected by a Federal inspector on March 4. The inspection certificate showed that the potatoes were "generally slightly dirty;**approximately 20% of stock shows few sprouts. Sprouts generally of less than 3/4 inch in length. Stock grades U.S. No. 1."

Rulings included in Decision

1. The shipment failed to conform to the specifications of the contract of sale. On Feb. 27 the broker issued a confirmation of sale which showed that the potatoes were to be "pale red beautiful quality." The evidence showed agreement between complainant and the broker as to the "beautiful quality" specification and also showed that the potatoes should be shipped for B.& O. delivery. The depositions of four witnesses submitted on behalf of respondent showed that the potatoes were not beautiful quality. It appeared that the potatoes at the time negotiations were first entered into between the parties had already been shipped for a period of fourteen days and that they were delivered by a carrier other than the B. & O. On Feb. 28 complainant wrote the broker in part "could not make delivery to Castellini on a full car Spauldings without serious delay. Consequently we are diverting him MDT 22158, out Chicago today via Wabash-B & O."

2. Respondent's rejection of the potatoes was not without reasonable cause and the complaint was therefore dismissed.

3. The countercomplaint was dismissed because damages had not been proven.

S-1159, Nov. 16, 1935, Docket 1755: (S.P.)

EASTERN PRODUCE DISTRIBUTORS, INC., NORFOLK, VA. v. JAKE CHEVLEN, CHICAGO, ILL.

Violation charged: Failure to account.
Principal point involved: Whether five cars of potatoes were sold to respondent or consigned to him.
Order: Complaint was dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the shipment of 7 cars of potatoes from Northwest, Va. to respondent, or his order, at Chicago, Ill. and 2 of the cars were, by respondent's request, diverted to Youngstown, Ohio and 5 were shipped to Chicago, Ill. Complainant contended that 7 cars of U.S. No. 1 potatoes were sold, not consigned, to respondent at $1.10 per bbl. f.o.b. Northwest, Va., and under instructions from respondent the cars were billed to M.W. Frissell & Co., Chicago, Ill.; that 2 of the cars were diverted to Youngstown, Ohio and paid for by respondent, and that upon arrival of the other 5 cars at Chicago, respondent accepted them and has since refused to pay complainant the full proceeds thereof. Complainant claimed the sum of $321.26 to be due.

Respondent alleged that owing to an agreement with the growers complainant could not consign the cars outright and respondent permitted the 7 cars to be billed at $1.10 per bbl. f.o.b. but was to disregard the invoices and account to the complainant for the potatoes, which were to be sold by M.W. Frissell & Co.; that respondent accepted the 7 cars with the distinct understanding and agreement that they were to be sold on consignment; that 2 of the cars were sold at Youngstown, Ohio and settlement made for them; that when the other 5 cars arrived at Chicago they were sold by M.W. Frissell & Co.; that complainant's agent advised respondent he was placing on the invoices of the 7 cars "U.S. one on arrival" to protect the complainant against any of the growers shipping poor grade of potatoes; that accounts sales made in the name of respondent covering the 5 cars were submitted by M. W. Frissell & Co. and checks were payable to the complainant, who accepted them without any complaint whatsoever; that shortly thereafter respondent received from complainant a check for $75 covering brokerage on 3 other cars of potatoes and that respondent had accounted in full to complainant.

Complainant submitted a sworn statement of facts alleging that the check in payment of the 5 cars referred to was made payable to the complainant by M.W.Frissell & Co. "and not by Jake Chevlen as alleged" and that the invoices established that the potatoes were sold to the respondent; and denied that the check for $75 was given to respondent after settlement on the 5 cars of potatoes. Respondent's sworn statement of facts alleged that the invoices on the first 2 cars, which complainant admitted were consigned, were made out in the same manner and with exactly the same notations as the invoices on the 5 cars in controversy and submitted the sworn statement of a witness to the effect that the $75 referred to was paid by complainant after accounting had been made on the 5 cars.

Rulings included in Decision

1. The evidence in the case was so conflicting that, in the absence of any written contract, it could not be determined whether the 5 cars of potatoes were sold to respondent by complainant or were consigned to respondent. Nearly every material statement by one party was denied by the other.

2. Complainant failed to establish the claim for reparation by a fair preponderance of evidence. The check for $75 was given to respondent two weeks after the potatoes were shipped to respondent or his order. It was not clear that at that time respondent had not paid complainant for the potatoes and it was not understood why the complainant should have paid the respondent $75 if, according to the complainant, the respondent should have accounted for at least $321.26. Of course the respondent would have owed complainant more than twice the last-named sum if complainant had not credited respondent with the net proceeds received from the potatoes handled on consignment.

S-1162, Nov. 23, 1935, Docket 1674: (Hearing)

CALIFORNIA PRODUCE DISTRIBUTORS, INCORPORATED, LOS ANGELES, CALIF. v. S. LANDOW FRUIT AND PRODUCE COMPANY, NEW HAVEN, CONN.

Violation charged: Rejection.
Principal points involved: Obligation of complainant to prove goods met specifications; grade of lettuce at shipping point; quality and condition of the lettuce on resale probably some indication that respondent acted in good faith in rejecting.
Order: Dismissal.

Outline of Facts

Complainant and respondent entered into a contract for the sale and purchase of a carload of Arrowhead brand lettuce to grade 85% U.S. No. 1 or better at shipping point, at the f.o.b. price of $1.75 per crate, top ice extra, for shipment from California to Connecticut. Upon arrival of the car, consisting of 304 crates, at destination approximately ten days after shipment, respondent rejected it and secured Federal inspection, the certificate showing that inspection was restricted to that portion of the load which was accessible from the doorways and on the basis of this portion the carload was found to fail to grade U.S. No. 1, but the inspector stated that approximately 80% of the portion examined was of U.S. No. 1 quality. Following rejection the lettuce was resold in New York at a net loss to complainant of $142.39, which sum added to the original contract price of $546.80 resulted in a loss to complainant of $689.19, which last named sum complainant contended was due and owing from respondent.

The complaint stated that two of complainant's representatives found the lettuce to grade 88% U.S. No. 1 at time of loading and that the Federal inspection at New Haven certifying that the lettuce graded 80% U.S. No. 1 substantiated the inspection made by complainant's representatives at shipping point, since some decay would materialize in transit during that season of the year, and that aside from the decay which had developed in transit the lettuce was shown to grade better than 85% U.S. No. 1 at destination since the only other defects found were 3% soft and 10% tip burn; that in compliance with respondent's instructions shipment was made under top ice and initial ice and because of abnormally hot weather prevailing respondent should have anticipated some decay. Depositions of complainant's president and district manager were placed in the record to show the quality and condition of the lettuce at time and place of shipment. Respondent contended that inspection at shipping point by two of complainant's employees did not constitute an unbiased inspection and should be given no consideration.

Rulings included in Decision

1. Complainant failed to furnish sufficient proof that the shipment met contract requirements at shipping point and the case was therefore ordered dismissed. No shipping point inspection was secured and complainant's statement that the lettuce graded 88% U.S. No. 1 was based upon the report of the Shed Foreman, which report showed that but four crates out of a total of 304 were repacked despite the fact that definite instructions "to properly inspect each car it is absolutely necessary to repack at least ten crates from each car" appeared on the report of inspection made by complainant's representatives. In such a case as this Federal inspection made at destination could be considered only to the extent that it might reflect the quality and condition of the lettuce at shipping point. Such inspection in this case was restricted to the stock between and one stack next each side of the door ways, which was not a considerable portion of the shipment.

2. The quality and condition of the shipment on resale should be given very little, if any, consideration but probably could be taken as some indication of whether or not respondent acted in good faith in rejecting the shipment. The fact that the lettuce was sold in New York at $1.50 per crate at a time when California Iceberg lettuce was selling there at from 50¢ to $3 per crate was some indication that the lettuce here involved was of poor quality.

S-1169, Nov. 27, 1935, Docket 1819: (S.P.)

R.D. KEENE, INCORPORATED, WINTER GARDEN, FLORIDA v. JOHN E. SCHINTZIUS, JOHN F. SCHINTZIUS AND E.M. SCHINTZIUS, DOING BUSINESS AS JOHN E. SCHINTZIUS, BUFFALO, N.Y.

Violation charged: Rejection.
Principal points involved: Suitable shipping condition; "creasing" due to inherent weakness in skin; rejection justified when not in suitable shipping condition.
Order: Dismissal.

Outline of Facts

Complainant and respondent, through a broker, entered into a contract for the purchase and sale of a carload of "Pheasant Brand, free from frost, color added, brogdexed, U.S. #1 Pineapple Oranges, $2.50 per box fob shipping point, 25¢ discount on Bronze." Complainant charged respondent with rejection without reasonable cause and alleged the oranges were resold at auction in Boston, Mass. for the net sum of $531.68, and therefore sought an award of $473.32, the difference between the original sale price and the amount realized upon resale.

Respondent's answer denied that the oranges conformed to the specifications of the contract of sale; admitted purchasing the oranges f.o.b. shipping point but alleged that there was a definite understanding with the broker that the shipment was subject to "destination inspection acceptance;" that respondent's refusal of the oranges was fully justified and was definitely made on Feb. 8, 1935 but complainant negligently allowed the oranges to remain on track until Feb. 13, 1935; and alleged that creasing is an inherent condition and not of transit origin.

Complainant's sworn statement of facts contended that since the oranges were sold to respondent fob Winter Garden they became the property of respondent when loaded there and the inspection at that point would necessarily be controlling; that there was nothing in the correspondence showing that the oranges were subject to inspection at Buffalo; that the refusal of the oranges by respondent was not justified; that complainant was not guilty of any negligence in disposing of them after respondent's refusal to accept them; and that in some cases creasing does increase after packing or in transportation.

The Federal-State inspection certificate issued at shipping point stated: "Grade defects range from 6 to 14% averaging 9% consisting mostly of creasing." The Federal inspection certificate issued at destination showed: "Creasing was found in all sample boxes ranging from 11 to 22%, averaging 16%. And in addition averaging 9% oranges are noticeably soft, puffy, most of which show deep sunken areas where pressed in packing; remainder oranges are firm."

Rulings included in Decision

1. The oranges were not in suitable shipping condition. This is indicated by the extent to which creasing was present at destination, taken into consideration with the 9% of soft and puffy oranges showing deep sunken areas where pressed in packing. Creasing appears to result from a weakness in the skin which as it develops manifests itself in the blemishes which have come to be known as "creasing." Even if this weakness of the skin was apparent to some extent at shipping point, as was true in this case, it may increase greatly en route to destination. It is, however, a weakness present at time of packing, and its development is not due to transit conditions but to an inherent weakness in the fruit.

2. Respondent's rejection of the shipment was justified and the case was therefore ordered dismissed.

S-1170, Nov. 29, 1935, Docket 1614: (S.P.)

LaMANTIA BROTHERS, ARRIGO COMPANY, CHICAGO, ILL. v. IVY A ANDREWS & COMPANY, DELMAR, DELAWARE, and/or AMERICAN FRUIT GROWERS, INC., PITTSBURGH, PA.

Violation charged: Failure to account.
Principal points involved: American Fruit Growers acted as owner and failed to disclose agency relationship with Ivy A. Andrews & Co.; complainant elected to proceed against American Fruit Growers rather than the principal; failure of agent of undisclosed principal to account violation of Act.
Order: Reparation in sum $273.85, with interest, awarded against American Fruit Growers, Inc.; dismissal as to Ivy A. Andrews & Company.

Outline of Facts

Complainant purchased from respondent 2 carloads of cucumbers which were shipped from Delmar, Delaware to complainant at Chicago, Ill. Upon arrival at destination complainant found that they did not comply with the warranty made by respondent American Fruit Growers, Inc. in that they were not in suitable shipping condition at the time of loading. Thereafter respondent American Fruit Growers, Inc., delivered the cucumbers to complainant to make resale of them for respondent's account. Complainant paid the transportation charges and other fixed items of expense and sold the cucumbers at the then market price at Chicago, but the amount received was less than the expenditures and complainant incurred a deficit of $273.85, which amount complainant was unable to collect.

Answering the complaint, the American Fruit Growers, Inc. contended that the cucumbers were sold to complainant by it as agent for Ivy A. Andrews & Co., and not as owner. The American stated that it informed Andrews the two cars had been sold to LaMantia and advised shipment to the American so it could control the disposition thereof. The American admitted that complainant suffered the deficit stated, but alleged that LaMantia's rejection was communicated to Andrews who took the stand that LaMantia must accept; that, realizing cucumbers were highly perishable by nature and something must be done concerning them, the American then, as agent for Andrews, instructed LaMantia to sell them for the best price obtainable, and believed LaMantia at all times knew the American was acting as agent for Ivy A. Andrews, or if not the exact name of the principal, that at least LaMantia knew the American was agent for some principal.

The separate answer of respondent Ivy A. Andrews & Co. was that the cucumbers were sold direct to respondent American Fruit Growers, Inc., and that Andrews at no time had any dealings with complainant.

Rulings included in Decision

1. If the respondent American Fruit Growers Inc. was not in fact the seller of the cucumbers, nevertheless it acted as the owner and failed to disclose to complainant that the sale was made as agent only. There was nothing in the record to substantiate the claim that LaMantia knew that the American Fruit Growers, Inc. was acting as the agent of Ivy A. Andrews & Company. In fact, the confirmation of sale issued by the American named itself as seller and stated that the sale was made for the account of the American Fruit Growers Inc.

2. Complainant elected to proceed against the respondent American Fruit Growers, Inc. Where an agent makes a contract in his own name without disclosing the fact that he is acting for a principal, the party with whom he contracts may enforce the contract against either the agent or the agent's principal. (See R.W. Burch, Inc. v. W.R. Hyatt & Co., S-178, Docket 119; L.J. Vogel v. H. Rothstein & Son, S-147, Docket 194; Henry J. Perkins Co. v. Cooney & Korshal, S-235, Docket 662, together with authorities cited therein.)

3. American Fruit Growers' failure to reimburse complainant constituted a failure truly and correctly to account in violation of Section 2 of the Act and reparation was therefore awarded against American Fruit Growers, Inc. in the sum of $273.85, with interest, and the complaint against Ivy A. Andrews and Company was dismissed.

S-1171, Dec. 6, 1935, Docket 1918: (S.P.)

BOROVETZ-KANSELBAUM CO., INC., PITTSBURGH, PA. v. FARMERS EXCHANGE, APEX, N.C.

Violation charged: Failure to deliver.
Principal point involved: Establishment of and measure of damages.
Order: Case dismissed.

Outline of Facts

On May 6 and 7, 1935 complainant and respondent entered into a contract for the shipment of three carloads of U.S. No. 1 sweet potatoes from Apex, N.C. to Pittsburgh, Pa. A telegram from respondent dated May 9 indicated that the first car was not shipped because the potatoes did not grade U.S. No. 1 due to decay; there was no evidence to show why the other two cars were not shipped. The complainant attempted to establish damages by showing the average market price for North Carolina sweet potatoes at Pittsburgh, Pa. on May 10 and May 13 to 17, inclusive, and subtracting from the average price for the six days mentioned the contract price, leaving a difference of 20¢ per bushel. Complainant estimated the three cars would have contained a total of 1680 bushels and therefore claimed damages in the sum of $336. Respondent filed no answer to the complaint.

Ruling included in Decision

Complainant failed to prove any damage sustained by it due to the failure of the respondent to ship the sweet potatoes called for in the contract and the complaint was therefore ordered dismissed. Complainant submitted no evidence whatever that it had any contracts for the sale of three carloads of potatoes or any part thereof, nor what, if any, would have been the expenses connected with the sale of the carloads of potatoes if they had been delivered. The damages claimed were therefore speculative.

S-1172, Dec. 6, 1935, Docket 1747: (S.P.)

D. CANALE & CO. INC., MEMPHIS, TENN. v. THE RYAN COMPANY, MINNEAPOLIS, MINN.

Violation charged: Failure to account.
Principal points involved: Commission man without authority to turn produce over to another commission man without shipper's consent; advance made was accommodation; complainant failed to establish deficit incurred by original consignee.
Order: Case dismissed.

Outline of Facts

On or about Feb. 20, 1934 a carload of seed potatoes was shipped by respondent from Berthold, Minn. consigned to the Growers & Shippers Distributors, Inc. at Memphis, Tenn. The Growers & Shippers Distributors, Inc. made an advance of $450.50 to respondent and sold 109 sacks out of 360 prior to the time this corporation ceased to do business, which was on or about July 15, 1934, when this claim was assigned to complainant, who sold the remainder of the potatoes. Due principally to a serious drought, the price of seed potatoes declined materially and it became necessary to place a considerable number of the potatoes in cold storage, the sales being completed by August 29, 1934. Complainant claimed a deficit of $398.16 was incurred and sought an award for that amount.

Respondent contended that Growers & Shippers Distributors, Inc. made a guaranteed advance of $2 per cwt. delivered at Memphis, Tenn. and the fact that the car was accepted on that basis was proved by a telegram of Feb. 28, 1934 requesting respondent to reduce the draft $54; that the Growers & Shippers Distributors turned the potatoes over to D. Canale & Co. without any authority from respondent and it was believed that they had heavy supplies of their own of the same variety and gave preference to thier own stock, using the consigned stock on the lowest-priced orders and thereby not realizing the full market value. Complainant contended the low prices were due to serious drought throughout the entire country and consequent lack of demand for said potatoes.

Rulings included in Decision

1. A claim for reparation is assignable, but a commission man may not, without the consent of the shipper, turn the produce over to another commission man to be sold. The Growers & Shippers Distributors, Inc. had no authority to turn the balance of the potatoes not sold by July 15, 1934 over to complainant. Respondent did not consent to complainant's selling the remainder of the potatoes after July 15 and apparently did not even know complainant was handling these potatoes until about the first of September, 1934. In a letter dated August 13 the respondent was advised by Growers & Shippers Distributors, Inc. concerning the handling of the potatoes and did not mention the fact that D. Canale & Co. were then handling the potatoes.

2. The advance of $450.50 by the Growers & Shippers Distributors, Inc. was an accommodation advance.

3. The complaint was ordered dismissed as the record failed to disclose what, if any, deficit was incurred by the Growers & Shippers Distributors, Inc. prior to July 15.

S-1173, Dec. 6, 1935, Docket 1812: (S.P.)

MICHAEL-SWANSON-BRADY PRODUCE CO., KANSAS CITY, MO. v. GOLDISH FRUIT COMPANY, ST. PAUL, MINN.

Violation charged: Failure to deliver.
Principal points involved: Cabbage failed to meet contract specifications; complainant failed to establish damages.
Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

On or about Jan. 27, 1935 respondent and complainant entered into a contract for the shipment of a car of good, medium, solid Holland cabbage at $12 per ton fob Wrenshall, Minn., to be shipped to complainant at Kansas City, Mo. The cabbage was not inspected at shipping point but on Feb. 4, the date of arrival at Kansas City, it was inspected by complainant and on the following day by a Federal inspector. The inspection certificate showed the cabbage averaged approximately 18% grade defects, consisting mostly of soft and puffy heads, and averaged 6% decay, most of which was black mold rot and some bacterial soft rot, generally in early stages, on one to three of the outer leaves. Complainant rejected the cabbage and respondent made other disposition of it.

Complainant contended that it had made sales against this car at $2 per cwt. delivered to its customers, which orders complainant was unable to fill, and claimed damages of $217.45, representing loss of profit of $209.77 plus $7.68 for inspection and telegraphic expenses incurred as a result of the failure of the cabbage to conform to the contract specifications. Respondent contended that the cabbage conformed to contract specifications as shown by affidavits attached to respondent's answer, and denied that the carload, or any part thereof, was sold to any of respondent's customers, claiming a loss of $42.23 by reason of complainant's rejection and the ensuing resale after a delay of about a week.

Rulings included in Decision

1. Complainant failed to establish what, if any, damages it sustained, and the complaint was therefore ordered dismissed. The list of names and addresses of customers to whom complainant claimed to have made sales showed all sales dated February 4 and 5. Complainant inspected the car on Feb. 4 and there seemed to be no reason why it should have made sales on and after the date the cabbage was found not to comply with the contract of sale. Furthermore, complainant said the sales were on a delivered basis of $2 per cwt. and some of the customers were outside Kansas City, Mo. It was not shown what expenses complainant incurred or would have incurred, in making delivery to these customers, but necessarily there would be some expense.

2. The cabbage did not conform to the contract of sale and therefore respondent's countercomplaint was ordered dismissed.

S-1178, Dec. 20, 1935, Docket 1851: (S.P.)

L.B. RESSEGUIE, WINCHESTER, VA. v. SMITH & CLARKE COMPANY, OWENSBORO, KY.

Violation charged: Rejection.
Principal point involved: Burden on complainant to prove goods met specifications of contract.
Order: Complaint dismissed.

Outline of Facts

In accordance with a contract entered into between the parties, complainant shipped from Martinsburg, W. Va. to respondent at Owensboro, Ky. a carload of apples. Promptly upon arrival they were inspected by respondent or its agent and rejected for the alleged reason that they did not comply with the specifications of the contract. Complainant sought an award of damages in the sum of $172.80, the difference between the amount for which the apples were sold to respondent and the amount realized upon resale thereof, occasioned by respondent's unlawful rejection.

Complainant claimed that he sold to respondent a carload of "bulk apples, viz. Utility Yorks, 2¼" up" and that the apples shipped were of the kind, quality and grade called for in the contract. Respondent alleged that they failed to measure up to U.S. Utilities, 2¼" size and that on arrival at Owensboro the car contained culls and showed considerable decay bruises and dry rot, and that Federal inspection was demanded by respondent but refused by complainant, who diverted the car elsewhere.

Ruling included in Decision

The complainant has failed to establish by a fair preponderance of the evidence that the apples conformed to the contract of sale and therefore the rejection was not without reasonable cause. The testimony on the point as to whether the apples conformed to the contract of sale is voluminous and conflicting. No Federal inspection was obtained by either party.

S-1180, Dec. 24, 1935, Docket 1446: (Hearing)

PLAUMBO-ARATA FRUIT COMPANY, FRUITLAND, IDAHO v. WEINBERG & GILBERT, DETROIT, MICHIGAN.

Violation charged: Rejection.
Principal points involved: Apples showing 10 to 16% Jonathan spot 7 days after shipment not in suitable shipping condition; respondent's rejection justifiable.
Order: Complaint dismissed.

Outline of Facts

Through a broker, complainant sold to respondent 2 carloads of Extra Fancy and Fancy Jonathan apples at the agreed price of $1 per bushel f.o.b. Twinn Falls, Idaho for shipment to Detroit, Michigan. Complainant shipped two cars which were shown by Federal shipping point inspection certificates to grade Idaho Combination Extra Fancy and Fancy, but they were rejected by respondent, destination Federal inspection seven days later showing 10 to 16% of the apples to be seriously damaged by Jonathan spot. Respondent gave prompt notice of the rejection and complainant resold the apples, claiming damages in the amount of $577.36, which amount was alleged to represent its loss.

Respondent sought to establish the absence of a valid contract, but an employee of the brokerage company testified that a standard confirmation of sale was made out and delivered by the witness to the respondent and that although the confirmation was never signed by respondent, respondent failed to object to the way it was made out. Respondent also contended that the apples at time of delivery were not in suitable shipping condition because of the presence of Jonathan spot. The contentions of the complainant and respondent and the testimony offered were conflicting, but the documentary evidence alone raised the important question of suitable shipping condition.

Rulings included in Decision

1. The apples were not in suitable shipping condition at the time of shipment. Jonathan spot is a disease peculiarly troublesome on Jonathan apples, which, if affected at all, are necessarily infested before storage, and the disease is, therefore, necessarily present at that time, although it may not then be apparent to any noticeable extent, but proper precautions in handling at the time of packing and during the storage period will control it if present. Although Jonathan spot is a skin disease, its presence seriously affects the appearance of the apple and therefore greatly lowers the market value of apples showing the presence of 10 to 16% of the disease, as in the instant case.

2. Since the apples were not in suitable shipping condition, the rejection was not without reasonable cause. The complaint was therefore ordered dismissed.

S-1183, Dec. 24, 1935, Docket 1847: (S.P.)

NATHAN WEISS, CHICAGO, ILL. v. ORLEY A. RHODES, GRANT, MICHIGAN.

Violation charged: Failure to deliver.
Principal points involved: Respondent not a licensee or subject to license at time of transaction, therefore no jurisdiction; damages must be proven.
Order: Complaint dismissed; respondent's counter-complaint dismissed.

Outline of Facts

Complainant alleged that on or about March 13, 1935 respondent sold to him a carload of onions at $5 per cwt. bulk f.o.b. Grant, Michigan, and he made part payment in the sum of $50; that on April 6, 1935 complainant wired respondent to have the onions available for packing and respondent telegraphed that he had not agreed to keep them all summer and they were sold and gone. Complainant therefore claimed damages of $300, being the difference between what the onions would have been worth had they met the specifications of the contract and the original contract price plus the deposit of $50.

Respondent alleged that the onions were grown on his farm and were sold to complainant in interstate commerce with the understanding that delivery would be made at Grant, Mich. upon payment of the balance due, on or before March 18; that complainant left no address and, having heard nothing from complainant, respondent assumed complainant did not intend to take the onions because the price had dropped and in order to protect himself respondent sold the onions at $4.50 per cwt., resulting in a net loss of $75 after giving the complainant credit for the $50 payment.

Rulings included in Decision

1. Respondent was not a licensee or subject to license between March 13 and 18, inclusive, 1935 and the complaint was therefore dismissed for want of jurisdiction.

2. Respondent's claim for damages in the sum of $75 was also dismissed since no proof was submitted that such damages were sustained.

S-1184, Dec. 27, 1935, Docket 1600: (S.P.)

LOSMAN PRODUCE COMPANY, PITTSBURGH, PA. v. M.C. KARKUT, JR., HATFIELD, MASS.

Violation charged: Failure to deliver.
Principal point involved: Claim of damages must be established by proof.
Order: Complaint dismissed.

Outline of Facts

Complainant and respondent entered into a contract for the purchase and sale of a carload of U.S. No. 1 onions to be shipped from loading point in the State of Massachusetts to the complainant at Pittsburgh, Pa. Complainant alleged that respondent failed to ship the onions, thereby causing complainant to suffer a loss of $150, being the difference between the purchase price and the prevailing market price at Pittsburgh, Pa. for which complainant sought an award of damages. Respondent failed to file an answer or make any defense.

Ruling included in Decision

Notwithstanding respondent has filed no answer it is incumbent on complainant to establish damages with reasonable certainty. Complainant failed to submit any evidence showing what, if any, damages were sustained and therefore the complaint was ordered dismissed.

S-1187, Jan. 8, 1936, Docket 1622: (Hearing)

VENICE GROWERS ASSOCIATION, VENICE, CALIF. v. SCANDURRA & GALLETTA, BUFFALO, N.Y.

Violation charged: Rejection
Principal points involved: Excessive wilt an indication of lack of suitable shipping condition; shipping point inspection certificate governs in f.o.b. sale unless reversed or sufficient evidence shows goods not in suitable shipping condition.
Order: Complaint dismissed; countercomplaint dismissed.

Outline of Facts

Complainant sold to respondents two carloads of celery at an agreed f.o.b. price, one to grade at least 85% U.S. 1 and the other at least 75% U.S. 1. A car containing 340 half crates of U.S. 1 celery and one containing 340 half crates which graded 75% U.S. 1 were shipped from loading point in the State of California to respondents at Buffalo, N.Y. and complainant charged respondents with unjustifiable rejection of these cars and sought an award of damages to cover the loss sustained by complainant, which was based on the difference between the contract purchase price and the resale price. Respondents sought to justify rejection on the ground that the celery was not up to contract requirements.

Complainant's witnesses stated in depositions that the celery was in good fresh condition and suitable for shipment to Buffalo, that respondents rejected because of the wilted condition, which did not exist at the time of shipment, and that the wilted condition would not cause the celery to be unmerchantable since it could easily be restored to its original condition at practically no cost. Respondent's witnesses deposed that the celery in one of these cars was not only badly wilted but also contained considerable mosaic and worm injury and that badly wilted celery cannot be restored so that it can be sold to the trade at top market price and the celery in these two cars could not therefore have been sold for better than fair to ordinary celery; that railroad records indicated that these shipments had been properly iced intransit and the cars were properly handled by the carrier so that no claim could have been filed by respondents for damage in transit.

Certificates of Federal inspection at destination showed the celery to be wilted considerably more than would be expected in the case of celery that was in proper condition for shipment under refrigeration from the State of California to the State of New York during July. A considerable number of inspection certificates were examined covering shipments of celery from California to various markets as far distant as Buffalo, N.Y. made at approximately the same time as these shipments. Approximately 75% of these cars arrived at destination showing what might be considered a negligible percentage of wilting and it seems highly probable that the celery here under consideration should have reached its destination in a much better condition than was evidenced by the destination inspection certificates if it had been in suitable shipping condition at the time of shipment. The record showed quite conclusively that the celery contained in these two cars moved under adequate refrigeration and within the average time required for transportation from the State of California to the State of New York.

Complainant had sold respondents another carload of celery to grade 85% U.S. 1 or better at an agreed f.o.b. price, for shipment from Torrence, Calif. to Buffalo, N.Y. Respondents accepted this shipment and complainant's witness deposed that a draft covering the car was drawn on and paid by respondent. By way of a counter-complaint respondents contended that this celery was sold at a loss as the result of brown and wilted condition on arrival at destination and sought an award of damages on that ground. Respondents' deposition witness stated that more wilt was found in this shipment than was found in the general run of shipments from California and that the size of the stalks ranged from 18" to 22" while the car was supposed to be 22". Shipping point Federal-State inspection showed that this celery graded U.S. No. 1 green and at the time of shipment was fresh, crisp and well-trimmed, with defects well within the grade tolerances.

Rulings included in Decision

1. In an f.o.b. purchase it has been universally held that the quality and condition of the produce at the time and place of shipment must control unless it can be conclusively shown that the produce was not in suitable shipping condition at the time of shipment.

2. The certificates of Federal inspection made at destination covering the celery in the two cars showed such a high percentage of wilt as to warrant the conclusion that this celery was not in suitable shipping condition at the time of shipment and this celery was therefore not in suitable shipping condition for shipment from the State of California to the State of New York, as required by the contract of sale, and for this reason rejection by respondents was not without reasonable cause and the complaint filed in this case was therefore dismissed.

3. Respondents failed to furnish sufficient proof that the celery in the one car was in sufficiently bad condition at destination to warrant the conclusion that it was not in suitable shipping condition at shipping point, and respondent's countercomplaint was dismissed. The record contained no certificate of inspection at destination and there was no reference to such inspection having been made.

S-1187-A, April 23, 1936, Docket 1622.

VENICE GROWERS ASSOCIATION, VENICE, CALIF. v. SCANDURRA & GALLETTA, BUFFALO, N.Y.

Petition: Reconsideration.
Principal points involved: Suitable shipping condition; complainant not liable for loss sustained on unauthorized sale for its account.
Order: Complainant's petition and respondents' petition for reconsideration denied.

Outline of Facts

Complainant and respondents each filed a petition for reconsideration of the findings and order made in this case on Jan. 8, 1936, dismissing both the complaint and the counter-complaint filed herein.

Complainant contended that newly discovered evidence showed the inadequacy of refrigeration in transit and that other shipments of celery from the same fields arrived at destination in good condition.

Respondents objected to the finding that insufficient proof was furnished in support of respondents' contention that all of the celery in the car involved in their contercomplaint was not up to contract requirements. The certificate covering the federal inspection made at destination on June 28, 1934, which had been made a part of one of the depositions but had in some way become detached from the file, had been located and was considered in conjunction with the shipping point inspection certificate.

Rulings included in Decision

1. The evidence previously considered clearly disclosed that the celery involved in complainant's contention of unjustifiable rejection was inherently defective at the time of loading and therefore was not in suitable condition for shipment to points as far distant as Buffalo, N.Y. The evidence concerning other shipments of celery from the same fields would be irrelevant and for that reason should receive no consideration. Complainant's petition for reconsideration was denied.

2. The inspection certificates mentioned above indicated that respondents were correct in their contention that the celery contained in the car involved in their countercomplaint was not in suitable shipping condition at the time of shipment, and the order previously issued in this case was ordered corrected to that extent. However, the record disclosed that this car arrived at Buffalo, N.Y. on June 26,1934, and respondents began unloading the celery on the following day for the purpose of selling it for the account of complainant without any authority whatever from or notice to complainant, who had specifically advised that if respondent failed to accept the shipment at the contract price other disposition would be made of it. Having thus taken possession of the celery without any authority whatever according to respondents' own theory of the case, certainly complainant could not be held liable for any loss sustained by respondents for what in effect amounted to a tort. Respondents' petition for reconsideration was denied.

S-1193, Jan. 17, 1936, Docket 1699: (S.P.)

HALL, HAAS & VESSEY, LTD., LOS ANGELES, CALIF. v. A.E. MARSH, trading as MARSH FRUIT COMPANY, YAKIMA, WASHINGTON and C.A. BUHRMASTER COMPANY, YAKIMA, WASHINGTON.

Violation charged: Failure to account.
Principal points involved: Insufficient evidence to warrant allowance of claim for adjustment of icing charge on car of apples; shipper liable for deficit on consigned car of produce.
Order: Dismissed as to C.A. Buhrmaster Company; dismissed as to A.E. Marsh; reparation of $235.67, with interest, against A.E.Marsh, trading as Marsh Fruit Company.

Outline of Facts

On or about January 25, 1934 complainant and respondent entered into a contract for the shipment of one carload of "fresh packed heavy 120s to 150s, few smaller, few larger" pears for shipment from Yakima, Washington to complainant at Los Angeles, Calif., with a guaranteed advance of 60¢ per box. Complainant alleged that the pears failed to conform to the contract specification as to size, and it was later agreed that, due to such failure, an accommodation advance of 50¢ per box would be paid by the complainant, provided the guarantee feature was eliminated; that the broker telegraphed this information to the respondent, who advised that such arrangement was satisfactory; that a draft in the reduced amount of $360 was paid by the complainant with the understanding that the car would be handled on straight consignment; that it was necessary to place the pears in storage; that sales were made as rapidly as possible and as fast as the market would warrant for

the class of pears shipped and prompt accounting rendered to respondent by complainant showing a deficit of $273.47, including an item of $37.80 due as an adjustment of icing charge on a car of apples shipped from Yakima, Washington Feb. 20, 1934 to the complainant, for which sum complainant sought an award. Complainant's contentions were supported by its sworn statement of facts.

Respondent A.E. Marsh filed no formal answer but in two letters written to the Department he alleged that in the matter of the car of apples on which complainant sought the $37.80 adjustment of icing charge he acted merely as a broker, as shown by the confirmation of sale which was submitted, and that no definite instructions were received from complainant until 48 hours after shipment, and upon arrival complainant accepted the car and paid the draft and freight charges without making any protest as to the icing charges; that with reference to the pears respondent received a wire demanding an allowance of 10¢ per box and cancelling the guarantee feature of the contract on the ground stated in the complaint, which allowance and cancellation of guarantee were agreed upon, but that the pears did conform substantially to the contract and if they had been sold upon arrival the car would have shown a profit.

Rulings included in Decision

1. C.A. Buhrmaster and Walter B. Glastey, trading as C.A. Buhrmaster Company, should not have been named as a respondent by complainant, as there was nothing in the record which showed that either C.A. Buhrmaster or Walter B. Glastey was in any way responsible for the transactions complained of. The complaint against them was dismissed.

2. Complainant failed to establish by a fair preponderance of the evidence that it was entitled to any reparation on the carload of apples and the claim against A.E. Marsh for $37.80 was dismissed.

3. Complainant made an accommodation advance to A.E. Marsh in the sum of $360 as agreed, and handled the carload of pears on consignment, selling the pears for the best price obtainable and incurring a deficit of $235.67. Reparation was awarded complainant against A.E. Marsh, trading as Marsh Fruit Company, in the sum of $235.67, with interest.

S-1196, Jan. 20, 1936, Docket 1677: (S.P.)

LEEF, SOMMER & CO., NEW YORK, N.Y. v. A. SIEGEL & COMPANY, BOSTON, MASS.

Violation charged: Failure to account.
Principal points involved: Burden on complainant to establish terms of oral contract; invoice not a writing signed by respondent.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on or about Oct. 20,1934 complainant sold to respondent by oral contract a carload of Guarantee Brand tomatoes at the agreed price of $2.20 per lug f.o.b. track Boston; that the car was unloaded and accepted by respondent at Boston, Mass. but that respondent has since failed, neglected and refused to pay complainant the agreed purchase price except the sum of $677.33, leaving an unpaid balance of $296.27, for which reparation was asked. In his opening statement of facts Harry Sommer made conflicting statements, in one place stating the tomatoes were sold as "Guarantee Brand" with no other representation or warranty and in another stating "we bought the car as sound Guarantee Brand tomatoes and sold them as such," and in his answering statement of facts he referred to the terms stated in the confirmation of sale, which referred to "Guarantee Brand."

Respondent alleged that the tomatoes were sold by complainant as grade U.S. 1; that upon arrival at Boston they were affected by decay and were badly puffed to such an extent that they did not then comply with the complainant's warranty; that upon inspection of the tomatoes after they were unloaded respondent telephoned complainant and said he would handle the car for complainant's account, which was done.

Federal inspection at Boston on October 23 showed that while the tomatoes were labeled "Guarantee Extra Selected," in at least 30 of the lugs decay ranged from 8 to 20%. In the other 600 lugs 15% were soft.

Rulings included in Decision

1. There was little in the record that definitely confirmed the oral statements of either party to the controversy. While it did appear that complainant purchased the tomatoes after inspection by its agent at Chicago and that no warranty of quality was made to complainant by the seller thereof, that circumstance would not prevent complainant from relying upon the inspection made by its agent and thereafter making sale of the tomatoes according to the quality and condition represented by such agent. Such inspection must have been made for some other purpose than to simply satisfy complainant as to the brand.

2. Complainant had the burden of proof and was compelled to establish the essential terms, warranty and condition of the oral contract of sale. The confirmation or invoice referred to by complainant was not a writing signed by or acknowledged by respondent except that it was received on or about October 22 "and after the car had been unloaded."

3. Careful consideration of the record as a whole indicated that complainant sold the tomatoes as "sound" stock and that they did not conform to such warranty. Whether respondent thereafter secured a new agreement from complainant to the effect that he was to handle the shipment for complainant's account or whether respondent should be held as a purchaser liable to complainant for the actual value of the tomatoes in diminution of the contract price, the net result was the same.

4. Respondent had already paid to the complainant the full amount legally due (the actual resale value of the shipment) and the complaint was therefore ordered dismissed.

S-1197, Jan. 20, 1936, Docket 1743: (S.P.)

C. I. & M. DINGFELDER, ORLANDO, FLA., v. ELLIS BROS. COMPANY, GRAND RAPIDS, MICH.

Violation charged: Rejection.
Principal points involved: One party to a written contract cannot make any material change therein without consent of other party; peaches conformed to contract and therefore respondent's rejection was without reasonable cause.
Order: Reparation $472.08 with interest.

Outline of Facts

On July 11, 1934 complainant and respondent, through a broker, entered into a contract for the purchase and sale of a carload of peaches, 864 one-half bushels, 1-3/4" and up, U.S. Grade No. 1 Hileys, for shipment from Gay, Georgia, to Grand Rapids, Mich., at 80¢ per half-bushel f.o.b. shipping point, or a total f.o.b. sale price of $691.20. Upon arrival of the peaches at Grand Rapids they were refused by respondent and were then resold by complainant for a net of $219.12, complainant seeking an award of damages in the sum of $472.08.

Respondent alleged that the contract was for the purchase of a carload of U.S. No. 1 peaches with the additional agreement that they should be absolutely free from worms; that the broker admitted that the original memorandum of sale did not correctly state the agreement between the parties and wrote on the memorandum of sale the words "no worms, S.B. Davis"; and that they were refused because they did not comply with the contract and contained worms. In support of the contention that the peaches were to be absolutely free from worms, respondent attached to its answer copy of a letter written by respondent on July 12, 1934 in which it was stated "We expect this car to be 'absolutely free from worms.'" The evidence in the case disclosed that the broker inserted on the buyer's copy of the memorandum of sale the words "no worms"; that a telegram was sent by the broker dated July 11, 1934 to complainant that the fruit was to show "No more worm injury than you claim", and that the complainant on the same date confirmed the sale of the peaches.

Federal-State inspection certificates showed that on July 11, 1934 the peaches conformed to the contract as to size and graded U.S. No. 1, under quality and condition stating "Stock is mature, hard to firm, mostly hard, well formed, clean and fairly well to highly, mostly fairly well to well colored, with approximately 25% of stock showing red color in excess of 50% surface of each fruit. Serious defects average 1% consisting mostly of soft and wormy peaches, with an additional 8%, minor defects, consisting mostly of scars and split pits. No decay." No Federal or Federal-State inspection was made at Grand Rapids.

Rulings included in Decision

1. A memorandum of sale dated July 11 showed that the contract was entered into on that date and respondent could not therefore make any material change in the written contract without the consent of the complainant.

2. The peaches were U.S. No. 1, conformed to the specifications of the contract as to size and less than 1% contained worms, and therefore conformed to the contract of purchase and sale.

3. Respondent's rejection was without reasonable cause and complainant was awarded damages in the sum of $472.08, with interest.

S-1203, Jan. 29, 1936, Docket 1824: (S.P.)

MARKMAN PRODUCE CO., DES MOINES, IOWA, v. BATTAGLIA BROTHERS, KANKAKEE, ILLINOIS.

Violation charged: Rejection.
Principal points involved: Medium size considered 2½ inches; large proportion of minimum size and 16% below minimum does not comply with specification "medium size".
Order: Dismissed.

Outline of Facts

On or about April 10, 1935 complainant and respondent, through a broker, entered into a contract for the purchase and sale of one carload of potatoes which were shipped from Hillsboro, N.Dak. to Kankakee, Ill. Complainant alleged unjustified rejection of the potatoes and sought to recover from respondent damages in the amount of $107.63, representing the difference between the amount for which the potatoes were sold to respondent and the amount realized by complainant on resale.

Respondent's answer alleged that the potatoes were bought by telephone and were described by the broker as being good, clean, well shaped, medium size, Ohio potatoes; that the inspection certificate made issued at Chicago showed the potatoes were badly misshapen with growth cracks and scab and therefore unfit for seed purposes for which they were bought; and that if the potatoes had been any good at all they would have sold for a higher price on resale. Respondent's contention as to the quality of the potatoes was supported by deposition of the manager of the brokerage company.

Federal inspection was made on April 15, 1935 at Chicago, Ill., which was after the potatoes had been rejected by respondent at Kankakee, Ill., the certificate reading in part: Generally ranging from 1-1/2 to 2-3/4 inches, mostly 1-7/8 to 2-1/2 inches, averaging 16% by weight less than 1-7/8 inches in diameter.

Rulings included in Decision

1. The evidence in the case showed that the complainant agreed to sell "one car North Dakota Red River Ohios, medium size, $1.50 bag delivered". The contract of sale specified medium size. This term has not been defined by the Department in the U.S. grades for potatoes. Research work undertaken in connection with the latest revision of these grades develops the fact that the trade looks on a potato of approximately 2½ inches in diameter as of "medium size". The U.S. grades do fix 1-7/8 inches as the minimum diameter for U.S. 1 and U.S. Commercial, with a tolerance of 5%.

2. It seemed clear that a lot of potatoes, such a large proportion of which was of the minimum size prescribed for U.S. 1 and U.S. Commercial grade and 16% of which were below that minimum size, cannot be said to comply with the specification "medium size". Were it to be argued that potatoes meeting this minimum size requirement should be considered as being of "medium size", then it would be no more than fair to apply the tolerance to size and by this standard the potatoes would fail to meet the specification in question. The complaint was dismissed.

S-1205, February 6, 1936, Docket 1832: (S.P.)

KIRK BROKERAGE CO., WHEELING, W. VA. v. R.L. HIGGINS & CO., MINNEAPOLIS, MINN.

Violation charged: Failure to account.
Principal points involved: Burden of proof on complainant to show potatoes did not conform to contract specifications; insufficient proof submitted.
Order: Complaint dismissed.

Outline of Facts

On or about March 22, 1934 complainant bought from respondent one car of potatoes for shipment from Rusted,Minn. to Powhatan Point, Ohio, complainant claiming that the sale was for U.S. No. 1 seed potatoes at the agreed net price of $611. In complainant's sworn statement of facts it was alleged that 8 sacks near the door of the car were inspected and were of the kind, quality and grade ordered but that a further inspection made on April 3 disclosed that the potatoes were in a deteriorated condition and part of them had been frozen for some period of time; that the potatoes were removed from the car and sorted and 103 bags found to be entirely worthless because they had been frozen, because of which complainant sought an award in the sum of $226.04, the amount of the total loss sustained.

Respondent in its answer denied that the potatoes had been frozen when placed in the car and that they were not U.S. 1, alleging that after arrival on March 28 unloading was completed on March 30 and no complaint made until April 3 and complainant's wire led respondent to believe the car had just arrived and was still "under load" and that no formal claim was received until May 28 and complainant failed to submit any satisfactory proof as to the quantity of the potatoes damaged and sorted or as to the quantity actually lost. Respondent's answer was supported by a sworn statement of facts alleging that the potatoes were all sound and in first class merchantable condition and entirely free from warehouse, field or transit frost at the time they were forwarded and respondent submitted depositions corroborating this statement.

Rulings included in Decision

1. It was incumbent upon complainant to show that the potatoes did not conform to the specifications of the contract of sale when they arrived on March 28. The evidence showed that the potatoes were sold on a delivered basis and arrived at destination on March 28, 1934 and unloading was completed on March 30.

2. Complainant failed to establish by a fair preponderance of evidence that the potatoes were frozen when they arrived at destination. An inspection was made by the complainant when the potatoes arrived and no complaint of any kind was made until April 3, 1934, when complainant wired respondent: "POTATOES BACK END OF POWHATAN CAR FROST BITTEN WILL UNLOAD IF YOU PROTECT***". Respondent did not know that the potatoes had already been inspected and unloaded, and believing that those in the back end of the car were found to be "frost bitten", agreed to protect the complainant. Nothing further was heard by respondent from complainant until May 28, when complainant claimed damages of $226.04. The complaint was dismissed.

S-1206, Feb. 7, 1936, Docket 1740: (Hearing)

BRADFORD FRUIT & PRODUCE COMPANY, BRADFORD, TENN. v. L.M. KIRKPATRICK COMPANY, RIPLEY, TENN. and L.M. KIRKPATRICK COMPANY v. BRADFORD FRUIT & PRODUCE COMPANY.

Violation charged: Failure to account.
Principal points involved: Countercomplaint for breach of warranty after acceptance as to grade and pack not proven and no damages collectible; respondent liable for invoice price of two cars purchased.
Order: Reparation $1888.50, with interest, awarded Bradford Fruit & Produce Co.

Outline of Facts

Bradford Fruit & Produce Co. is referred to as complainant in this case and L.M. Kirkpatrick Company as respondent.

Complainant alleged that on June 27, 1934 it sold to respondent a car of tomatoes at a total f.o.b. invoice price of $1073.75, on which a balance of $375 remained due and owing at time of filing complaint and that on July 7, 1934 two more cars of tomatoes were sold to respondent at a total invoice price of $1888.50, which amount remained unpaid. Complainant sought an award of $2263.50.

Respondent alleged that on June 25, 1934 it purchased from complainant 5 cars of tomatoes, one of which was sold by respondent to a buyer in Syracuse, but that when attempt was made to divert the car to that buyer it was found that another party had obtained possession of the shipment, and respondent, being required to furnish a car on the contract to the Syracuse buyer, substituted the car mentioned in the above paragraph as sold on June 27; that complainant had been given a check in payment of the car purchased on June 25 and to adjust the matter that check was applied on the car purchased on June 27, and therefore there was no unpaid balance due on that car; that payment on a check given for the $1888.50 balance was stopped to protect respondent on other purchases, 3 cars of tomatoes purchased during the period July 1 to 7, 1934 as U.S. No. 1 stock being only 85% U.S. 1, which occasioned a loss of $1586.51, and 7 other cars purchased as straight pack being irregular pack, which occasioned a loss of $1531.25.

Complainant's witness contended that the terms of the contract were 85% U.S. 1 and that straight pack was not mentioned; respondent's witness stated that the terms were always U.S. 1, straight pack. Federal inspection certificates showed that the three cars graded 85% U.S. 1 and that in six of the seven cars the stock did not assume the status of straight pack. Complainant's witnesses testified that only four cars of tomatoes were sold to respondent on June 25, 1934, while respondent's witnesses testified that five cars were purchased on that date.

Rulings included in Decision

1. The weight of the testimony supported respondent's contention as to the purchase of 5 cars on the date in question and that complainant only diverted 4 cars. Respondent showed that 5 cars were paid for on that date and a member of complainant company admitted receipt of check covering the 5 cars. Complainant was therefore required to comply with the contract and did so by supplying the car mentioned as sold on June 27. That the complainant was aware respondent was using this car as a substitute car and that respondent was contending 5 cars were purchased, is clearly shown by the act of complainant in applying the check in payment of the 5th car to the car supplied on June 27; therefore complainant was not entitled to the $375 balance claimed.

2. The testimony for respondent failed to sustain the contentions of the countercomplaint as to the contract for U.S. 1 cars, straight pack. The countercomplaint was in the nature of an action for breach of warranty after acceptance and the burden of proof was therefore upon respondent.

3. Respondent accepted the cars at invoice price and, having failed to show that the terms of the contract were on the basis alleged or that the cars did not meet the terms of the alleged contract, respondent could not recover for the amount of damages claimed. The proof offered to show damages was incompetent and wholly insufficient.

4. The weight of the testimony was with complainant and that company was awarded $1888.50, with interest.

S-1208, Feb. 10, 1936, Docket 1911: (S.P.)

LEONARD, CROSSET & RILEY, INC., RUPERT, IDAHO v. WALKER-SMITH COMPANY, BROWNWOOD, TEXAS.

Violation charged: Failure to account.
Principal points involved: Respondent accepted potatoes on unconditional protection; 24 hour rule has no application when produce accepted; complainant entitled to proceeds potatoes sold by carrier; respondent justified in deduction for loss and expense of reconditioning stock.
Order: Complaint dismissed.

Outline of Facts

On or about Oct. 10, 1934 complainant, through a broker, sold to respondent a carload of U.S. #2 Idaho Russet potatoes for shipment from Jerome, Idaho to San Angelo, Texas. Complainant claimed that upon arrival of the potatoes at destination respondent telegraphed, through the broker, on Oct. 18 that practically every sack showed decay and mold; that the telegram indicated the loss would not be great and complainant telegraphed immediately to ascertain the time of arrival, and requested that an inspection be made by the Western Weighing and Inspection Bureau as to condition, and on this basis complainant would protect respondent against any loss; that the carrier telegraphed complainant on Oct. 19 that the potatoes arrived on Oct. 15; that respondent should have advised complainant of the condition of the potatoes within 24 hours after arrival; that complainant then advised respondent on Oct. 19 that the defects mentioned by the railroad agent were permissible and therefore complainant withdrew protection; that 65 sacks which respondent claimed were unmerchantable were sold by the carrier; and that respondent owed complainant the sum of $98.91.

Respondent denied the allegations of the complaint and alleged that the potatoes arrived at respondent's siding in San Angelo at about 4 P.M. Oct. 18 and were immediately inspected; that the carrier was advised by telephone of the decaying condition and the carrier's agent agreed to immediately wire the shipper or his agent and later stated the shipper had been advised; that complainant was advised of the condition within an hour after the car was spotted on respondent's siding for inspection; that in the meantime respondent advised complainant's agent by telephone of the condition of the stock and agreed, with complainant's agent's wired approval on Oct. 18, to accept the car on the basis of protection for loss; that it was impossible to give the percentage of decay at that time and respondent did not say the loss would not be great and that respondent knew nothing of any conditional protection or that it should comply with certain requests before protection would be granted.

The evidence disclosed the potatoes were inspected at shipping point on Oct. 8 by a Federal-State inspector and at that time conformed to the specifications of the contract. The potatoes arrived at destination at 10;00 p.m. Oct. 15 and respondent was notified by telephone at 8:00 a.m. Oct. 16. The car was placed at 3:00 p.m. on Oct. 18, or within one hour after the delivery order was surrendered. On October 18 the broker advised the complainant that the respondent had telephoned that the potatoes in practically every sack inspected showed decay and mold and, if accepted, must be protected against loss. The broker stated "Don't think claim will be very large." The complainant replied by telegram the same date to the effect that protection would be granted. On Oct. 19 complainant telegraphed respondent that the defects were permissible and complainant "will assume no loss under * * * circumstances." Respondent returned 65 sacks to the carrier, which were sold for $26, and this amount is now held by the carrier.

Rulings included in Decision

1. The respondent accepted the potatoes on the basis of the protection promised by complainant before complainant telegraphed that the protection would be withdrawn. Complainant should have granted the protection conditionally if it desired to obtain further facts. The evidence does not show that any material facts were withheld from the broker who was acting as agent for complainant.

2. The 24 hour rule is applicable where there is a rejection and has no application where produce is accepted based on protection. Respondent's contention that the 24 hours time did not start until the car was placed on "respondent's siding or wharf" was also without merit.

3. While this Department has no jurisdiction over the carrier under the Act, it would appear that complainant is entitled to the $26.

4. Respondent was justified in deducting $98.91 representing the loss and expense in connection with reconditioning the potatoes and the complaint was dismissed.

S-1209, Feb. 10, 1936, Docket 1948: (S.P.)

BROOKSVILLE ORCHARD CO., INC., WAYNESBORO, VA. v. NATIONAL COMMISSION DISTRIBUTING CORPORATION, WASHINGTON, D.C.

Violation charged: Failure to account for a consignment.
Principal point involved: Failure to account for consigned goods a violation of the Act.
Order: Reparation $429.04, with interest.

Outline of Facts

In the month of March, 1935 complainant consigned to respondent, to be sold for complainant's account for a commission of 10%, a carload of apples, complainant to pay the freight and cartage. Complainant alleged failure of respondent to account for the shipment and sought an award for the amount of the net proceeds. Respondent failed to make any answer to the complaint.

At the hearing in PACA Docket 1905, Sec. Dec. 1111, disciplinary complaint of H.A. Spilman v. this respondent, in which W.E. Burton was found to be responsible for this respondent, a Department investigator testified that an examination of respondent's records indicated that this car contained 444 bu. baskets and 31 bbls. of apples received on March 12, which were sold for a gross of $571.15, the freight amounting to $59.75 and commission to $57.11. After inquiry among commission men the sum of $25.25 was fixed as a reasonable cartage charge, leaving net proceeds of $429.04 on the shipment.

Ruling included in Decision

Respondent's failure to account and pay to complainant the net proceeds received from the sale of said apples was in violation of the Act. Complainant was awarded $429.04, with interest.

S-1214, Feb. 20, 1936, Docket 1947: (S.P.)

FRANK NARUTO & CO., LTD., LOS ANGELES, CALIF. v. PETER S. SCANLAN & SONS, INC., DETROIT, MICH.

Violation charged: Rejection.
Principal points involved: Definition of terms "well blanched" and "fairly well blanched"; respondent's agent authorized purchase car "good quality and bleach"; rejection justified since car did not meet respondent's specifications.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on or about Jan. 3, 1935, through respondent's agent, complainant contracted to ship to respondent one carload of celery at an agreed price f.o.b. shipping point, with terms net cash shipping point acceptance, the contract calling for no specific grade; that the car was shipped on the same date and at the time of loading was inspected by respondent's broker and found to be of the character, grade and quality ordered, and accepted by him at the time of shipment; that on Jan. 11 the railroad agent in Detroit notified complainant the shipment was "refused account not as ordered" and was then resold by complainant for $182.63 less than the contract price, for which complainant asked an award.

Respondent contended that its agent was only authorized to purchase for it a car of "well blanched" celery and that this celery failed to comply with that specification.

The certificate issued by a Federal inspector at Detroit, Michigan on Jan. 16, 1935 showed the celery to be "generally fairly well blanched; grade defects averaging 15% consisting mostly of pithy and poorly blanched stalks" and to grade "approximately 85% U.S. 1 quality."

Rulings included in Decision

1. Respondent authorized its agent to purchase and cause to be shipped a carload of celery of "good quality and bleach" and respondent's specifications and the authority of said agent to act for respondent were communicated to complainant. The telegrams exchanged between the broker and respondent showed the respondent did not want "Fairly well blanched" celery, but "good quality and bleach." U.S. Standards for rough celery define the term "well blanched" to mean that the mid-rib portions of the branches on the stalks are generally of a creamy white color and "fairly well blanched" to mean that the mid-rib portions of the branches on stalks are generally of a light greenish to creamy white color. There was nothing to indicate that both seller and buyer were not familiar with the meaning of the terms employed in the exchange of wires.

The celery was not well bleached or of good quality and bleach, and on that account did not conform to respondent's specifications and respondent's rejection was not without reasonable cause. The complaint was dismissed.

S-1216, Feb. 27, 1936, Docket 1798: (S.P.)

S. GOLDSAMT, INC., NEW YORK, N.Y. v. M. STERNICK, INC., NEWARK, N.J.

Violation charged: Failure to account.
Principal points involved: No completed contract of purchase and sale entered into; respondent's diversion to complainant no indication of acceptance.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on or about Nov. 7, 1934 it sold respondent a carload of green beans; that respondent inspected the shipment at destination and thereafter diverted the car to complainant at New York City, the diversion involving such exercise of control over the shipment as amounted to acceptance thereof; that complainant resold the beans for respondent's account, and asked for a reparation award for the difference between the net returns received upon resale and the contract price.

Respondent claimed negotiations for the purchase of a car of fancy beans were had by telephone on Nov. 7; that the complainant offered a car of fancy stock then rolling toward New York to be stopped at Newark for respondent's inspection and approval; upon such inspection the car was found not to contain fancy beans and respondent called complainant by telephone and so informed him and complainant then asked respondent to divert the car to complainant at New York City inasmuch as complainant believed that a better marked was in view.

The record showed the beans were shipped from Canal Point, Fla. on Nov. 3, 1934. On Nov. 7 an oral agreement by telephone was reached between complainant and respondent whereby respondent was to take the beans at $3.15 per hamper delivered at Newark, N.J. Respondent had not seen them. Complainant diverted the shipment to respondent, respondent inspected it at Newark and notified complainant the examination showed the beans were not fancy, and on Nov. 8 notified the carrier to deliver the car to complainant at New York City.

Rulings included in Decision

1. No completed contract of purchase and sale was entered into nor was any purchase and sale agreement made and signed by respondent or its agent.

2. Respondent's diversion of the car to complainant in the manner above stated in no way indicated an intention on the part of respondent to accept the shipment. Respondent obviously intended the diversion to mean exactly the opposite. The statute of frauds applicable to sales made in both the States of New York and New Jersey provides that the sale "shall not be enforceable by action unless the buyer shall accept part of the goods, or choses in action, so contracted to be sold, or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf."

S-1219, Feb. 29, 1936, Docket 1845: (S.P.)

SOUTHGATE BROKERAGE CO., INC. TRADING AS SOUTHGATE PRODUCE CO., NORFOLK, VA., v. BATTAGLIA PRODUCE CORPORATION, NORFOLK, VA.

Violation charged: Rejection.
Principal point involved: Insufficient evidence that contract was entered into.
Order: Complaint dismissed.

Outline of Facts

Complainant alleged that on or about April 13, 1935 it sold to respondent a carload containing 400 100-lb. bags of U.S. #1 Maine Green Mountain table potatoes at the agreed price of $1.20 per bag f.o.b. warehouse Norfolk, Va.; that the potatoes arrived at Norfolk on April 19 and complainant rendered an invoice to respondent and forwarded a delivery order authorizing delivery to respondent; that on April 20 one of respondent's employees examined the potatoes; that respondent did not take possession and on May 1 advised it was unwilling to go through with the transaction and disclaimed making the purchase; that since the potatoes were not accepted by May 3, and after due notice to respondent, complainant sold the potatoes for respondent's account for the net sum of $360 and sought an award of damages in the sum of $120. Complainant supported its contentions by a sworn statement of its sales manager stating that orders had been accepted from the respondent with the understanding that payment would be made at time of delivery, and he referred to three transactions of the kind.

Respondent stated that inquiry was made about a car of potatoes and the potatoes were inspected by his employee but that respondent neither ordered, left a draft, nor signed an order for the car, and denied that there was a sale.

Ruling included in Decision

Complainant failed to establish by a fair preponderance of the evidence that a contract of purchase was entered into by the respondent. The complaint was dismissed.

S-1222, March 5, 1936, Docket 1783: (S.P.)

G.N. SMITH, MINNEAPOLIS, MINN. v. FLORIDA FRUIT COMPANY, DUBUQUE, IOWA.

Violation charged: Failure to account.
Principal points involved: Stem end rot a disease of field origin and melons affected not in suitable shipping condition; respondent entitled to allowance for decayed melons but liable for balance purchase price.
Order: Reparation $48, with interest.

Outline of Facts

Complainant and respondent entered into a contract, through a broker, for the purchase and sale of "1 car Texas Dale watermelons, 26# average, fresh loaded stock, good red cutting at 50¢ cwt. fob" Runge, Texas, or a contract price of $134.45. The freight charges were $231.35, making a total delivered cost of $365.70 for 1037 melons in the car, or a fraction more than 35¢ per melon. The melons were shipped on June 12, 1934, and diverted to Dubuque, Iowa, arriving at 6:45 a.m. on June 17, and the consignee was notified at 7:30 a.m. The unloading was started at 9 a.m. on June 18 and finished at 1 p.m. June 19. Complainant claimed that the melons were accepted by respondent and he sought an award for the sum due in payment therefor.

Respondent contended the car was opened by respondent or its employees and a large number of decayed melons noted; that respondent immediately telephoned the broker of the condition and the broker advised respondent to unload at once and they would take the matter up with the shipper; that the broker informed respondent that the shipper would not make an adjustment; that 247 decayed melons were found in the car, the decay being stem end rot; and denied that absolute refusal had been made to pay for the melons but that respondent was willing to pay $43.03, which was the amount due complainant. Respondent's deposition witness testified as to the number of decayed melons in the car.

Rulings included in Decision

1. The watermelons did not conform to the specifications of the contract of sale for the reason that some of them contained a stem end rot disease which is of field origin and therefore they were not in suitable shipping condition, causing a loss of 247, the delivered cost of which amounted to $86.45.

2. Respondent accepted and unloaded the melons and admitted there were 790 good melons. Complainant was awarded $48, with interest, the amount of the award being the difference between the contract price of $134.45 and $86.45, the delivered cost of the 247 decayed melons.

S-1223, March 5, 1936, Docket 1906: (S.P.)

RICHMAN & SAMUELS, INC., NEW YORK, N.Y. v. JOHN AIELLO & BRO. CORP., ALBANY, N.Y.

Violation charged: Rejection without reasonable cause.
Principal points involved: Onions sold fob; in absence of grade or quality specification complainant must deliver produce suitable for purpose for which purchased and in suitable shipping condition; onions affected with excessive Gray Mold Rot not in suitable shipping condition.
Order: Complaint dismissed.

Outline of Facts

On or about April 5, 1935, through a broker, complainant sold to respondent a carload of Chilean onions, Spanish type Valencias, 3" minimum, at $2.60 per crate fob New York City, which onions were shipped from New York, N.Y., through Weehawken, N.J., to respondent at Albany, N.Y. Complainant claimed that the broker was respondent's authorized agent and the contract was evidenced by a standard form of broker's memorandum of sale, which requires that it be signed only by the broker; that prior to the execution of the memorandum of sale the brokers were advised that the onions were soft at the stem end and might not stand up under shipment to Albany so as to arrive in the best condition and the brokers advised complainant they would be satisfactory to respondent; that the memorandum of sale did not specify the condition and quality of the onions and they were in merchantable condition; that on April 5 complainant duly mailed to respondent the original confirmation of sale and invoice and respondent neither orally nor in writing has ever denied that the onions were purchased by him but upon arrival at Albany they were rejected and resold by complainant for respondent's account, such resale resulting in a loss of $357.14, for which complainant sought an award.

Respondent alleged that it placed an order with the brokers for a car of Spanish type onions at $2.60 per box, subject to approval, inspection and acceptance by respondent at siding at Albany; that the brokers submitted to respondent the usual form of standard memorandum of sale containing specifications reading "one (1) car Spanish type Valencia onions 3" lgr. @ $2.60 fob Brooklyn;" that the memorandum of sale contained the signature of the brokers and did not contain the signature of respondent and there had not been any confirmation of sale executed by respondent; and that the onions were inspected by respondent at Albany and rejected for the reason that they did not meet respondent's requirements and did not conform to the representations made to respondent; and that the inspection certificate showed an average of 10% decay.

Federal inspection at Albany, N.Y. on April 8, restricted to condition only showed: "Stock is mostly firm and dry. In most crates decay ranges from 2 to 15%, in a few crates 15 to 30%, averaging 10%. Decay is mostly Gray Mold Rot and Soft Rot."

Rulings included in Decision

1. The record showed that the onions were sold on an fob basis. The broker's standard memorandum of sale showed that on April 5 complainant sold to respondent, through a broker, one rolling carload of "Chilean onions, Spanish type Valencias, 3" minimum at $2.60 per crate f.o.b." Complainant confirmed the sale on the same day by mailing to respondent a confirmation of sale reading in part "500 boxes Chilean onions at $2.60 f.o.b. New York, out New York 4/5/35."

2. In the absence of specification as to grade or quality complainant must deliver produce suitable for the purpose for which it was purchased, if known, and must deliver to the carrier produce in a condition suitable for shipment to the designated destination. Neither complainant nor the broker represented the onions to be of any particular quality, grade or condition.

3. The onions were not in suitable shipping condition at the time of shipment. Gray Mold Rot is a slowly progressing organism and shipments of onions which are affected with it and show decay ranging from 2 to 15% in most crates and 15 to 30% in others, averaging 10%, 3 days after date of shipment, must under these conditions be considered to have contained at least a considerable portion of onions in a more or less advanced stage of decay when loaded in the car. Since no proof was furnished that respondent, or the broker negotiating the sale, had knowledge of or waived the condition, the complaint was ordered dismissed.

S-1229, March 31, 1936, Docket 1977: (S.P.)

M. STERNICK, INC., NEWARK, N.J. v. LEEF, SOMMER & CO., NEW YORK, N.Y.

Violation charged: Failure to account.
Principal points involved: Whether sale was $1.90 per lug f.o.b. Newark, N.J., or $1.75 per lug delivered Jersey City, N.J.; incumbent upon complainant to establish the material allegations of complaint.
Order: Complaint dismissed.

Outline of Facts

On or about October 19, 1934, complainant and respondent entered into a contract for the sale and purchase of a carload of tomatoes shipped in interstate commerce from Guadalupe, California, to Newark or Jersey City, N.J. Complainant sought an award for $109.79 as the amount remaining due on the carload; respondent claimed the full purchase price had been paid.

The contract of purchase and sale was oral and there was direct conflict in the evidence between the complainant and the respondent as to whether the sale price was $1.90 per lug. f.o.b. Newark, N.J., as complainant alleged, or $1.75 per lug delivered at Jersey City, N.J., as respondent alleged. Neither party submitted any evidence in writing in support of either contention and no testimony was submitted by either party from any witness not connected with either of the parties.

Ruling included in Decision

It was incumbent upon the complaintnt to establish by a fair preponderance of the evidence the material allegations in the complaint, which complainant failed to do. The complaint was ordered dismissed.

HEARING	COMPLAINANTS	AMOUNTS
S-1230, Mar. 31, 1936, Docket 2017 -	J.C. FAMECHON CO., MINNEAPOLIS, MINN.	$277.83 & int.
S-1231, Mar. 31, 1936, Docket 1944 -	BERT ISRAEL, MORRILL, NEBR.	714.50 & int.
S-1234, Mar. 31, 1936, Docket 1950 -	NATIONAL FRUIT & VEGETABLE EXCHANGE, INC., PRESQUE ISLE, MAINE.	154,44 & int.
S-1235, Mar. 31, 1936, Docket 2002 -	JONES & KAVANAGH CO. LTD., LOS ANGELES, CALIF.	348.79 & int.
S-1236, Mar. 31, 1936, Docket 1942 -	WILLIAMS & HANEY, TOPEKA, KANSAS.	1221.12 & int.
S-1237, Mar. 31, 1936, Docket 1949 -	R.L. HIGGINS & CO., MINNEAPOLIS, MINN.	147.39 & int.

AGAINST THE F. RODREICK COMPANY, DALLAS, TEXAS, RESPONDENT.

Violation charged: Failure to account.
Principal point involved: Respondent liable for the proceeds of produce sold for the account of the shippers.
Order: Complainants awarded reparations in the amounts set opposite their names in the above heading.

Outline of Facts

The above-named complainants shipped in interstate commerce to respondent produce to be handled by respondent on a consignment basis. Respondent accepted and sold the produce but failed to remit to the complainants the net proceeds realized from such sales, for which the complainants sought awards.

A formal hearing was held at Dallas, Texas, on January 13, 1936 at which the disciplinary complaint of H.A.Spilman against the same respondent S-1226, Docket 1953 was also considered. Respondent admitted the allegations of the complaints. Mr. F. Rodreick testified that he was the actual owner of respondent firm and that the affairs of respondent are terminated except for collections of accounts and other business incident thereto. Respondent is no longer engaged in business under license from the Department of Agriculture.

Ruling included in Decisions

Respondent failed truly and correctly to account to complainants and complainants were awarded reparations in the amounts set forth above.

S-1233, April 1, 1936, Docket 1684: (S.P.)

URICK & HOLLIS, LOS ANGELES, CALIF. v. SPRACALE FRUIT CO., PITTSBURGH, PA.

Violation charged: Rejection without reasonable cause.
Principal points involved: Incorrect billing, causing loss of sale to prospective purchaser; sufficient ground for rejection.
Order: Complaint ordered dismissed.

Outline of Facts

On or about September 20, 1934 respondent contracted to purchase from complainant on a delivered basis a carload of U.S. No. 1 grapes shipped from North Dinuba, Calif. to Pittsburgh, Pa. Complainant alleged that tender of the grapes was made to respondent at Pittsburgh in compliance with the contract of sale but that respondent rejected them without reasonable cause; and claimed that the original net contract price was $681.67 and resale following rejection netted complainant $347.02, and therefore sought an award for the difference, or $334.65, plus $4, the cost of Federal inspection, or a total of $338.65.

Respondent alleged that it had a prospective buyer for the grapes on the early morning of September 24; that the car arrived at 10:50 P.M. on September 23, billed to Urick & Hollis, advise Spracale Fruit Co.; that the agent of the railroad notified respondent early in the morning of September 24, but would not allow inspection on account of the car being billed "advise"; that complainant did not wire the carrier until 1:00 P.M. September 24 to allow inspection, which was too late for that day's market, and because of the delay the sale to this prospective customer was lost, and the car was therefore rejected.

Rulings included in Decision

1. The grapes did comply with the specifications of the contract of sale as shown by the Federal State inspection certificate at shipping point and the Federal inspection certificate at Pittsburgh.

2. The grapes were not billed as called for in the contract. The confirmation of sale showed they were to be shipped to the Spracale Fruit Co., and they were billed to "Urick & Hollis, advise Spracale Fruit Co." The evidence showed they arrived at Pittsburgh at 10:40 P.M., Sept. 23, and respondent was notified at 4:50 A.M. Sept. 24, but that respondent was not permitted to inspect them until 1 P.M. Sept. 24. Respondent had a prospective buyer for the grapes on the morning of Sept. 24 and apparently lost the sale to this customer because the grapes were not shipped in accordance with the terms of the contract of sale.

3. Since the grapes were not billed in accordance with the terms of the contract of sale, it cannot be said that respondent's rejection was without reasonable cause. The complaint was ordered dismissed.

S-1241, April 9, 1936, Docket 1890: (S.P.)

DRIVER & WOODROW, WENATCHEE, WASHINGTON v. SCHONS FRUIT CO., INC., WENATCHEE, WASH.

Violation charged: Failure to deliver in accordance with contract requirements.
Principal point involved: Acceptance of shipping point inspection certificate binds buyer.
Order: Complaint dismissed.

Outline of Facts

In the month of November, 1934 complainant purchased from respondent a carload of Fancy Winesap apples at the agreed price of 85¢ per box f.o.b. Wenatchee, Washington. Complainant inspected the apples at shipping point and caused Federal-State inspection to be made, the inspection certificate showing that the apples graded Washington Fancy, and complainant accepted and paid respondent the purchase price on the basis of said inspection. Thereafter the load was consigned to complainant at Minneapolis, Minn., where diversion was made by complainant to a purchaser at Greenville, S.C. Complainant claimed that inspection of the apples at Greenville revealed them to be affected by decay averaging approximately 15%, although the claim that the apples showed from 4 to 20% decay was not definitely established, and that the failure of respondent "to furnish apples of good, sound quality" was in violation of section 2 of the Act, and on account thereof complainant sought an award of damages in the sum of $230.18. Respondent's answer was to the effect that the apples were inspected, sold and accepted at shipping point on the basis of Federal-State of Washington inspection and grade.

There was no dispute as to the facts. The parties agreed that the contract called for delivery by respondent of one carload of Fancy Winesap apples of designated sizes, labeled "Trojan" brand, acceptance basis joint Federal-State inspection certificate and buyer's approval of quality and condition.

Ruling included in Decision

The apples furnished by respondent conformed to its warranty at the time and place of purchase and the record failed to establish that respondent failed to deliver in accordance with the contract of sale without reasonable cause. There was nothing to indicate that the Federal-State inspection did not clearly describe the true condition of the apples at the time of the fob purchase thereof. The complaint was dismissed.

S-1245, April 10,1936, Docket 1885: (S.P.)

B. CHALEFMAN & CO., DENVER, COLO. v. PAUL McKERCHER and/or TYRRELL-BROWN CO., WENATCHEE, WASH.

Violation charged: Failure to deliver a carload of apples in accordance with contract requirements.
Principal points involved: Federal-State shipping point inspection certificate showing apples conformed to contract deciding factor in f.o.b. sale.
Order: Complaint dismissed.

Outline of Facts

On or about Sept. 19, 1934 complainant bought from respondent a carload of Extra Fancy Delicious apples at an agreed price f.o.b. Wenatchee, Wash., for shipment from Wenatchee to Denver, Colo. Complainant claimed that the apples failed to meet contract specifications for the reason that they were not Extra Fancy Delicious in that they contained heavy decay and were not satisfactory for storage, and sought an award of damages.

Respondent Tyrrell-Brown Co. claimed there was no provision the apples were to be suitable for storage; that they met the specifications of the contract; that if any decay existed when the apples reached Denver it was due to the fact that the car remained on track at Denver for a period of six days after arriving and that any loss resulting to the complainant was due to the failure of complainant to comply with the terms of the purchase, and the fact that the apple market dropped suddenly. Respondent Paul McKercher alleged that he acted as a broker in the sale of the apples and that this car stood on track at Denver without reicing "for what I recall to be about ten days."

The apples were inspected by a Federal-State inspector at Wenatchee, Washington on Sept. 30, 1934 and the defects of grade were found to be within the tolerance, the apples being "firm, No decay. Washington extra fancy."

Ruling included in Decision

This was an f.o.b. sale and the Federal-State inspection certificate made at shipping point showed the apples conformed to the specifications of the contract of sale. The evidence showed that the apples arrived at Denver on Oct. 5 or 6 and remained on track for at least six days and that there was no complaint concerning them for at least ten days after arrival at Denver. The complaint was ordered dismissed.

S-1249, April 16, 1936, Docket 1935: (S.P.)

CHARLES E. GIBSON, INC., MEGGETT, S.C. v. CARBONE BROTHERS & CO., NEW YORK, N.Y.

Violation charged: Rejection of three carloads of potatoes.
Principal points involved: Cancellation of contract for 10 cars after 7 cars had failed to meet grade; 10 to 13 days unreasonable time to hold potatoes in New York City before reselling.
Order: Complaint dismissed.

Outline of Facts

On or about May 1, 1935 complainant contracted to sell to respondent 10 carloads of U.S. No. 1 Cobbler potatoes, to be shipped from Meggett, S.C. to respondent at New York City. The potatoes were shipped in installments and appeal inspections on the first 6 cars showed they did not grade U.S. 1, whereupon respondent rejected them and advised complainant in substance that the contract was cancelled. Complainant shipped the other 4 cars, 3 of which were found to grade U.S. 1 upon appeal inspection. Respondent refused to accept these and complainant alleged unjustified rejection of the 3 cars grading U.S. 1 which it claimed were inspected and accepted by respondent's agent and were covered by drafts on which were stamped the words "inspected and accepted" and sought an award of damages in the sum of $909.73, the difference between the contract price and the amount realized upon resale.

Respondent alleged justification in cancelling the contract after 6 cars failed to grade U.S. 1 and respondent's agent submitted an affidavit denying he inspected any potatoes and stating he knew nothing regarding the grade or quality of the potatoes. Counsel for respondent contended that complainant waited an unreasonable length of time before resale was made and therefore failed to establish that it was entitled to any damages. Complainant's counsel contended that the lapse of time was due to the fact the potatoes were not dumped on the market but were held for the best price obtainable.

Ruling included in Decision

It was unnecessary to determine whether respondent was justified in cancelling the contract after it was found the first 6 carloads did not conform to contract of sale because complainant did not resell the potatoes within a reasonable time after they were rejected and therefore failed to establish damages. It was not necessary for complainant to hold the potatoes 10 to 13 days before resale to prevent dumping on a city which consumes as many potatoes as New York. The market declined after the 3 cars grading U.S.1 arrived in New York and it was impossible to ascertain the amount of damages, if any, complainant would have sustained had they been resold within a reasonable time after their arrival.

S-1250, April 17, 1936, Docket 1609: (Hearing)

J. TRANKINA & CO., CHICAGO, ILL. v. HELLER BROS. CO., INC., NEW YORK, N.Y.

Violation charged: Failure to deliver.
Principal points involved: Principal and agent; agreement for allowance precluded further claim.
Order: Respondent's check for $81, held in the Bureau, was ordered sent to complainant; complaint was ordered dismissed as to any claims in addition to the $81.

Outline of Facts

During the month of July, 1934, through an exchange of telegrams which passed between respondent and J.F. Erb, a broker at Chicago, complainant purchased from respondent, acting as agent for Sal Esposito, the shipper, a carload of tomatoes warranted as good quality and pack, for the agreed price of $1007.74 f.o.b. Ahoskie, N.C. Federal inspection made at Chicago showed the tomatoes failed to grade U.S. 1 on account of grade defects in excess of tolerance.

Complainant contended the purchase was made from respondent and that because of respondent's failure to deliver tomatoes meeting contract specifications a loss of $511.29 was sustained, for which an award was sought. The deposition of one of the partners of complainant company stated that they took care not to purchase U.S. 1 grade for the reason that tolerance is too great, and with the specification of good quality and pack they expected to get at least U.S. 1 pack.

Respondent alleged that J.F. Erb acted as agent of complainant; that respondent as agent for Sal Esposito, in accordance with Sal Esposito's description of the stock, negotiated for the sale of and delivered to complainant tomatoes complying with contract specifications as evidenced by telegrams submitted; that after complainant received the tomatoes and while respondent had the proceeds of sale in its possession complainant objected to the quality of the shipment and complainant and respondent agreed to an allowance of 10¢ per lug "in full accord and satisfaction of any claims that complainants may have had against the respondent, and that respondent did thereafter endeavor to obtain a further allowance from the shipper"; that the shipment consisted of 810 lugs and respondent mailed a check for $81 to complainant, who thereafter refused to accept it; and that respondent, relying on its agreement with complainant, accounted to its principal and divested itself of any moneys belonging to the said principal. Deposition of the manager of respondent's office supported these allegations.

Rulings included in Decision

1. At the time the agreement was consummated J.F. Erb, and also complainant, had knowledge that respondent was representing the shipper, San Esposito, as agent and not as principal. Complainant's contention that it knew only respondent in this transaction was refuted by complainant's telegram to respondent sent on Aug. 1, 1934, the day after the car arrived in Chicago, in which complainant stated it expected to "hold you or Esposito for severe loss."

2. As shown by telegrams quoted in the decision, complainant offered to accept 10 cents allowance, if more could not be obtained from the shipper, and before complainant had in any way indicated that it would not live up to this offer of settlement on the basis of 10 cents allowance, respondent issued its checks to complainant and the shipper, thus paying out all the money that was held by it for others as the result of this transaction. The Secretary ordered that respondent's check for $81, dated August 7, 1934, held in the Bureau, be mailed to complainant and that complainant be instructed that this check was to be accepted in full satisfaction of all claims against respondent in this transaction, as provided in the agreement between the parties, as evidenced by the telegrams exchanged between them on August 2, 1934.

3. The shipper, Sal Esposito, was not included as a respondent in this case and no consideration could, therefore, be given to the question of whether or not he failed to deliver the kind and quality of produce called for by the terms of the contract negotiated with complainant through its agent, J.F. Erb.

4. The complaint was ordered dismissed insofar as it applied to any claims in addition to the $81 previously tendered by respondent.

S-1252, April 18,1936, Docket 1925: (Hearing)

STEVENS BROTHERS, BALTIMORE, MD. v. J. AUSTEN HUNTER CO., CRYSTAL CITY, TEXAS.

Violation charged: Failure to account for a deficit on four cars of green corn.
Principal points involved: Breach of contract through nonpayment of drafts for agreed accommodation advances; proof of damages.
Order: Complaint dismissed; respondent awarded $1.

Outline of Facts

On or about May 16, 1935 complainants and respondents, through their agents, entered into an agreement whereby complainants were to advance respondents $1 per package for green corn, the cars to be handled at 8% commission and complainants to make arrangements with respondents' bank for advances to be considered as cash or secure bank guarantee. Four cars were shipped from loading points in the State of Texas to complainants at Baltimore, Md. and the complainants accepted the said cars but claimed that, owing to the poor quality and condition of the corn and to the market conditions, after payment by complainants of a $522 accommodation draft drawn by respondents a deficit of $337.27 was sustained, for which an award was sought.

Respondents, by way of a countercomplaint, contended that although complainants had agreed to pay a draft on each car they paid only one, and because of this failure respondents suffered damages in the sum of $5000 to business reputation and future bank credit, $1000 for loss of orders and $2500 cost and potential profit on the five cars, the fifth car having been diverted from complainants when they refused to pay the drafts as agreed.

Rulings included in Decision

1. Complainants breached their contract by failing to advance the sum of $1 per package and failed to show by a preponderance of the evidence that the amount of reparation claimed was due them. The weight of the testimony showed that complainants breached their contract as to the accommodation advances and steadfastly refused to comply with the terms of the agreement entered into by their representative and a representative of respondents. By continued promises they came into possession of four cars of respondents' produce, although breaching their contract and failing to comply therewith during the time. The complaint was ordered dismissed.

2. Respondents failed to prove that they had been actually damaged. The proof in support of the damages alleged was too speculative and indefinite to warrant reparation in excess of a nominal sum. Respondents were awarded $1.

S-1254, April 21, 1936, Docket 1915: (S.P.)

THE DAVIS MERCANTILE CO., JOPLIN, MO. v. THE MAHAFFEY COMMISSION CO., CHICAGO, ILL.

Violation charged: Failure to deliver.
Principal points involved: Grade of potatoes; shipper entitled to prompt notice of complaint concerning commodity; measure of damages.
Order: Complainant awarded $20.60 with interest.

Outline of Facts

On or about Nov. 6, 1934 complainant, through a broker, purchased from respondent a carload of U.S. No. 1 round white Wisconsin potatoes at $1.08 per cwt. delivered at Joplin, Mo., the shipment being diverted from Chicago, Ill. Complainant claimed the stock was of a kind, quality and grade inferior to contract specifications and that because of respondent's failure to deliver in accordance with the contract it suffered a loss of $41.20, the difference between the value of potatoes conforming to the contract and the market value of those delivered.

Respondent denied that it failed to furnish potatoes of the kind, grade and quality specified in the contract and alleged that the potatoes arrived at Joplin on Nov. 9 and were delivered to complainant the same day but that it had no knowledge of any complaint until Nov. 17, when it received complainant's letter of Nov. 14 addressed to the broker, and that complainant did not bill respondent for the loss complained of until Dec. 6.

The evidence showed the potatoes arrived at Joplin on Nov. 9 at 11:20 a.m. and were delivered to complainant at 12:10 p.m. on the same day, but that it was about 3 days before they were inspected at destination by the broker and no federal inspection was obtained. Depositions of the broker and of complainant's shipping clerk were offered, stating that there was considerable decay and that a few potatoes were running water in the car and that after they were gotton in the house all of them started running.

Rulings included in Decision

1. Respondent was not afforded any opportunity to have the potatoes inspected or to take any steps to protect its rights. On Nov. 14 a letter was written to the broker, which was not received by the respondent until Nov. 17. It was not until Dec. 6 that respondent was advised definitely as to the amount of damages claimed by complainant. Purchasers should not permit perishable commodities to remain in their possession, whether in or out of the car, for 3 days before an inspection is made or wait an undue length of time before advising the shipper as to any complaint concerning the commodity.

2. The potatoes when they arrived were not U.S. No. 1 and did not conform to the specifications of the contract. Complainant suffered damages, but not in the amount claimed because some of the damage accrued while in the possession of complainant. Some of the damage doubtless resulted in the delay on the part of the complainant in handling the potatoes, but just how much the record does not show. Respondent agreed to pay complainant one-half of the alleged damages. Complainant was awarded $20.60, with interest.

S-1256, April 23, 1936, Docket 1809: (S.P.)

M.J. McCARTHY & CO., CHARLESTOWN, MASS. v. B.B. KIRKLAND SEED CO., COLUMBIA, S.C.

Violation charged: Rejection of a carload of potatoes.
Principal points involved: Allowance for demurrage; error in invoicing.
Order: Complaint dismissed.

Outline of Facts

On or about Feb. 2, 1935 complainant, through a broker, contracted to sell to respondent a carload of seed potatoes at the agreed price of $1.75 per 10-peck sack. The potatoes were shipped from Boston, Mass. to respondent at Columbia, S.C., but the complainant by mistake invoiced them at $2 per sack and drew a draft on respondent based on that amount, later reducing the draft by telegram to bank. Complainant charged respondent with unjustified rejection of the car and sought an award of damages in the sum of $223, representing the difference between the price for which the potatoes were sold to respondent and the amount realized by complainant upon resale thereof.

Respondent alleged the potatoes arrived one day and that the invoice was received the next; that 3 days later the draft had not been corrected; that respondent needed the potatoes, inspected them, and found the quality "was o.k."; that attention was called to the fact that demurrage was accumulating on the car; that after several days respondent was advised by the bank that the draft had been corrected but that respondent rejected the car because of complainant's refusal to make any allowance for the demurrage. Complainant admitted the lapse of five days between the time the car arrived in Columbia and telegraphing the bank to reduce the draft.

Rulings included in Decision

1. In view of the fact that the complainant made an error in invoicing the potatoes at $2 instead of $1.75 per sack and drawing the draft on the respondent on the basis of $2 per sack, the respondent was clearly within its rights in refusing to pay the demurrage.

2. Complainant was fully advised in regard to the matter, but refused to pay the demurrage. Complainant therefore failed to show that the respondent rejected the potatoes without reasonable cause. The complaint was ordered dismissed.

S-1261, April 25, 1936, Docket 1718: (S.P.)

LAMB FRUIT CO. OF WASHINGTON, YAKIMA, WASH. v. GAMBLE-ROBINSON CO., MINNEAPOLIS, MINN.

Violation charged: Unjustifiable rejection of a carload of apples.
Principal points involved: Specifications of contract shown by wires; what constitutes good hard condition for apples.
Order: Complaint dismissed.

Outline of Facts

On or about Nov. 16, 1934, complainant, through a broker, contracted to sell to respondent a carload of apples consisting of 700 boxes of common storage, orchard run, faced and filled Jonathans and 100 boxes of common storage orchard run, faced and filled Rome Beauties at the agreed f.o.b. price of 80¢ per box for the former and 75¢ per box for the latter. The apples were shipped from loading point in the State of Oregon to respondemt at Willmar, Minn., where they were rejected by respondent, and complainant sought an award for a loss of $135.80, the difference between the contract price and the net resale price of $499.20.

Respondent contended that the original memorandum of sale did not correctly state the terms of sale; that at respondent's request the broker made correction by adding the warranty that the apples were to be "free from scald and breakdown, hard condition, good pack". Complainant alleged that the broker was not authorized to make this warranty. An affidavit by a member of the brokerage firm stated that the above specification was inadvertently omitted from the original memorandum of sale and that the memorandum of sale with the specifications later added, together with the change in price, represented the true contract.

Federal-State inspection was made at Imbler, Oregon on Nov. 20, 1934, the day before the car was shipped, and the Jonathans were certified as "ripe, few shriveled, 1% decay" and the Rome Beauties as "firm ripe to ripe, no decay."

Rulings included in Decision

1. The broker prepared a memorandum of sale which failed to conform to the exchange of telegrams and was therefore immediately objected to by both parties. The memorandum of sale was disregarded and an effort made to interpret the intention of the parties as evidenced by the exchange of wires quoted in the decision. It had been previously ruled by the Secretary and the court that all communications must be given consideration in arriving at a conclusion with reference to the terms of the contract actually entered into.

2. The wires involved specified an f.o.b. sale of orchard run, faced and filled Jonathan and Rome Beauty apples, which must be in good hard condition and free from scald and breakdown, at the agreed price of 75¢ per box for 100 boxes of Rome Beauties and 80¢ per box for the remainder of the carload of Jonathans.

3. The apples were not up to contract requirements at the time of shipment. At the time of delivery to the carrier they were ripe with a few shriveled, while the contract stated definitely that they "must be good hard condition." Apples that are ripe with a few shirveled are not in good hard condition.

4. Since the apples did not conform to contract requirements at time of shipment respondent was justified in rejecting them. The complaint was therefore dismissed.

S-1262, Apr. 25, 1936, Docket 1975: (S.P.)

UNITY DISTRIBUTING CO., INC., CHICAGO, ILL. v. WISHNATZKI & NATHEL, NEW YORK, N.Y.

Violation charged: Unjustifiable rejection of a carload of tomatoes.
Principal points involved: Routing of car; fixing of fault for complainant's nonreceipt of respondent's check; complainant obligated to notify respondent before diverting car for sale for its account.
Order: Complaint dismissed.

Outline of Facts

On June 19, 1935 complainant and respondent, through their representatives, entered into oral negotiations for the purchase and sale of a carload of U.S. 1 tomatoes at $1.25 per lug f.o.b. Jacksonville, Texas. The tomatoes were shipped to Chicago and from that point to Syracuse, N.Y. Complainant alleged that tomatoes meeting contract specifications were shipped to the Unity Distributing Co., Chicago, and that complainant was prepared to divert the car to respondent immediately upon receipt of a check according to the terms of sale; that following the refusal of the tomatoes by respondent, complainant was unable to find another buyer and consigned them to a firm in Syracuse, N.Y., to be sold for respondent's account; and that the resale netted complainant $476.39, or $356.11 less than the price for which they were sold to respondent, for which latter sum complainant sought an award of damages.

Respondent alleged that upon receipt of its check in Chicago the car was to be diverted to New York via Pennsylvania lines at St.Louis; that in accordance with its representative's instructions, respondent on June 21 mailed a check to "United Distributing Co.", which was returned due to the fact there was no such party; that complainant ordered the car diverted from Chicago to Syracuse, N.Y. on June 24 at 4:50 P.M. and did not follow the established practice of advising respondent to accept the car or that it would be sold for their account. In substantiation of its contentions respondent submitted a photostatic copy of the return envelope which contained the check. Complainant contended the check was to be sent by air mail and that there was no excuse for the envelope being incorrectly addressed, and submitted an invoice dated June 19 reading, in part, "inspected and accepted by" respondent's representative "payment to be made by air mail check to Unity Distributing Company, Chicago, immediately." The invoice was unsigned and the evidence did not show that a copy was mailed to respondent.

Rulings included in Decision

1. The evidence was conflicting as to whose fault it was that the letter containing the check was improperly addressed. If the complainant had given the respondent the street address in Chicago the letter would probably have been delivered even though the name of the company did not correctly appear upon the envelope.

2. The evidence was conflicting as to whether the tomatoes should have been shipped to St.Louis and then by the Pennsylvania R.R. directly to New York, or whether the complainant was correct in shipping the tomatoes to Chicago.

3. Complainant should have advised respondent before billing the tomatoes from Chicago to Syracuse, N.Y. to be sold on consignment. The tomatoes arrived in Chicago on or about June 22 and on the afternoon of June 24 complainant forwarded them from Chicago to Syracuse, N.Y. On June 25 complainant for the first time communicated directly with respondent as shown by the telegram reading in part "no check yours at hand however car rolling east can still bill you."

4. Complainant failed to establish by a fair preponderance of the evidence that the tomatoes were rejected by respondent without reasonable cause and the complaint was therefore dismissed.

S-1263, April 25, 1936, Docket 2005: (S.P.)

WARRENS FRUIT GROWERS ASSN., WARRENS, WIS. v. WEST TEXAS PRODUCE CO., FORT WORTH, TEXAS.

Violation charged: Rejection without reasonable cause of a carload of strawberries.
Principal point involved: Complainant's breach of contract.
Order: Complaint dismissed.

Outline of Facts

On or about June 25, 1935 complainant sold to respondent a carload of U.S. 1 strawberries at the agreed price of $1.40 per crate f.o.b. Warrens, Wis., respondent's purchase being subject to approval of complainant's wired government inspection certificate. The strawberries were shipped to respondent at Forth Worth, Texas, but rejected by respondent, and complainant sought an award of $498.88 as a result of such rejection.

Respondent rejected the shipment after inspection at Fort Worth on account of the extent of the berries found to be soft and because complainant failed and neglected to wire the results of government inspection at shipping point. Government inspection at Fort Worth certified "**Berries showing soft or soft sunken spots range from 4% in some crates to approximately 40% in others, in most crates in top layers from 15 to 25%, and in lower layers in stacks next bracing from 8 to 15% soft or with soft sunken spots; remainder stock in all layers is firm and dry. In most crates no decay noted, some crates with a few cups showing 1 to 4 moldy decayed berries (Gray mold rot)". It appeared from this inspection certificate that the hatch covers of the car were closed; that the plugs were in and that the bunkers were full of ice at the time of destination inspection.

Rulings included in Decision

1. Complainant first breached the contract of purchase and sale. There was no way of determing from the record that the berries were Grade U.S. 1 at shipping point. The information shown by the federal destination inspection certificate was not sufficient to establish grade U.S. 1 quality at loading point and there was nothing in the record to show that respondent waived this provision in the contract of sale.

2. Respondent's refusal to accept the shipment did not therefore constitute rejection without reasonable cause and the complaint was dismissed.

S-1266, April 27, 1936, Docket 2022: (Hearing)

CLINTON BOLICK, INC., FORT MYERS, FLA. v. MILES-CONLEY CO., BALTIMORE, MD.

Violation charged: Unlawful rejection of a carload of tomatoes.

Principal points involved: Promise to buy on a condition which remains unsatisfied does not constitute contract of purchase and sale; 24 hour rule applies only to a person who has made a purchase of a commodity not previously inspected.

Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on Dec. 18,1934, through a broker at Baltimore, Md., it sold to respondent a carload of tomatoes, consisting of 965 lugs, at agreed prices for the different sizes, aggregating $1761, and that because of respondent's rejection of the car complainant was compelled to make resale and complainant asked for an award of damages in the sum of $1452.21. Respondent admitted entering into negotiations with complainant for the purchase of the car of tomatoes but alleged the car was refused because the contents were not as represented.

The facts as established by the evidence were that on Dec. 13, 1934 complainant shipped from Fort Myers, Fla. a car containing 965 lugs of tomatoes, that while the shipment was in transit complainant's broker at Baltimore informed complainant that sale might be consummated to respondent at Baltimore and complainant thereupon diverted the car to that destination. The shipment arrived at Baltimore Dec. 18 and respondent on that date made a partial inspection and wired complainant to the effect that on account of the heavy loading a thorough inspection could not be made at that time but that respondent would honor complainant's draft provided the tomatoes throughout the car were of equal quality with those inspected in the doorway. Thereafter respondent made a more thorough inspection and refused the shipment for the reason that the condition and quality of the tomatoes loaded in the ends of the car were inferior to that in the rest of the load and the parties failed to agree to a reduction in price so as to enable respondent to accept the shipment.

Rulings included in Decision

1. At no stage of the negotiations did the parties arrive at such an agreement as was essential to the creation of a contract of purchase and sale. It clearly appeared that the offer to purchase at prices for the different sizes quoted was conditioned upon the inspection showing that the "tomatoes throughout the car" would be of "equal quality." Respondent's inspection showed that the quality and condition of the tomatoes in the ends of the car were in a more advanced stage of ripeness and were also affected by decay to a greater extent that the rest of the load.

2. Respondent was not obliged to notify complainant of rejection within 24 hours. The applicable regulations defining "reject", "reasonable time" and "acceptance" apply to a person "who has purchased" a commodity not previously inspected and who is required to exercise the right of inspection to determine whether the commodity conforms to warranty within 24 hours following receipt of notice of arrival. In the instant case respondent had not purchased the tomatoes.

3. Since no completed contract of purchase and sale was entered into respondent's final refusal to accept the shipment did not constitute any breach of contract. The complaint was dismissed.

S-1268, April 28, 1936, Docket 1623: (Hearing)

H. ROTHSTEIN & SON, PHILADELPHIA, PA. v. S. YAMASHITA and/or NORTHWESTERN PACKING CO., SEATTLE, WASHINGTON.

Violation charged: Failure to ship a number of cars of produce called for by a written contract.
Principal points involved: Measure of damages; speculative profits.
Order: Complaint dismissed.

Outline of Facts

On March 3, 1934 respondent Northwestern Packing Co., through S. Yamashita, entered into a written contract with complaint, through its agent, whereby respondent was to deliver to complainant at Seattle, as consignments, 30 cars of U.S. 1 lettuce, 15 cars of U.S. 1 peas and 5 cars of U.S. 1 cauliflower, the shipments to "commence with the start of the shipping season for the year 1934 and continue through said 1934 shipping season," complainant agreeing to make accommodation advances in specified amounts "at the time of shipment against the original bill of lading together with a copy of invoice and federal inspection certificate showing cars billed to" complainant, complainant's compensation to be 10% of the gross selling price obtained. Complainant sought an award of damages in the sum of $6057.65 because of respondent's failure to make shipments in accordance with the contract.

S. Yamashita identified a copy of the written agreement attached to the complaint as the agreement that he had executed. He testified, through an interpreter, that the negotiations preceding the signing of the contract were had through one Geo. Ishihara who was unable to read or write English very fluently and understood the contract to mean that it applied to "surplus cars"; and that one car of lettuce shipped under the contract, which cost respondent $758.10, was sold in Chicago at a loss of $362.51, while he sold another car of similar lettuce at Seattle for $765.85.

Rulings included in Decision

1. Respondent failed to make shipment of any of the lots called for in said contract, excepting one carload of lettuce. The evidence showed an intentional failure to make the shipments and was sufficient to establish respondent's breach of contract.

2. The general rule is that no recovery can be had for loss of profits which are uncertain, contingent, conjectural or speculative.

3. Complainant's claimed damages were too speculative and uncertain to enable calculation. The claimed damages were the estimated total commission that would have been earned if respondent had made shipment of each of the consignment lots covered by the contract; what expenses would have been incurred by complainant in selling the cars has nowhere been stated; the proof was based upon the claimed average market value of said commodities upon the Philadelphia, Pa. market during certain stated periods in the months of May, June, July and August, 1934 and the average market price of said commodities varied from time to time during said months and generally declined. Reference to the contract disclosed that the total shipments called for might have been made at any time commencing with and continuing during the shipping season. Moreover, complainant might have disposed of the shipments at any one or more of a number of different markets.

4. Since the damages could not be calculated, the complaint was dismissed. On petition of complainant for reconsideration the Secretary affirmed this decision by Order dated June 6, 1936.

S-1269, April 28, 1936, Docket 1926: (S.P.)

ADAMS PACKING CO., INC., AUBURNDALE, FLA. v. CITY PRODUCE CO., HAZLETON, PA.

Violation charged: Unjustifiable rejection of a car of mixed grapefruit, tangerines and oranges.
Principal point involved: Both parties must consent to any alteration of a contract.
Order: Complaint dismissed.

Outline of Facts

On January 4, 1935 respondent purchased from complainant, through a broker, one carload of Fla. mixed citrus fruits consisting of 200 boxes of grapefruit, sizes 46s to 80s, at a delivered price of $2 per box, the balance of the load to be made up of choice tangerines, sizes 168s to 250s, at a price of $1.65 per box delivered at Hazleton, Pa. Complainant stated 45 boxes of oranges were added in order to secure the minimum rate; that respondent rejected the load at destination and that resale of the rejected shipment resulted in a net loss of $302.98, for which amount complainant sought an award.

Respondent alleged that complainant failed to deliver fruit in accordance with contract specifications. On Jan. 7 complainant wired the broker a description of the fruit contained in the car and contended that respondent's failure to object to the changes amounted to an acceptance of the changed manifest.

Rulings included in Decision

1. Respondent did not agree to a modification of the original contract. The substance of complainant's wire to the broker of Jan. 7 was not brought to the attention of respondent by the broker until the morning of Jan. 9 and the carload in question arrived at approximately the same time. It was obvious that respondent had no opportunity and therefore could not and did not consent to the substitutions made.

2. Complainant failed to deliver fruit in conformity with the agreement. Complainant admitted that the sizes of the grapefruit and tangerines called for in the original contract were not shipped and that 45 boxes of oranges were included in the shipment that had not been ordered.

3. Since the fruit did not conform to contract specifications respondent's refusal to accept was not a rejection without reasonable cause. The complaint was dismissed.

S-1270, May 4, 1936, Docket 1775: (S.P.)

NEER & COMPANY, CLEVELAND, OHIO v. RICE PRODUCE CO., BIGLERVILLE, PA.

Violation charged: Failure to deliver two carloads of apples.
Principal points involved: Proof of contract; respondent not bound by unauthorized act of employee.
Order: Complaint dismissed.

Outline of Facts

Complainants claimed that on Oct. 29, 1934 they purchased from respondent at respondent's warehouse at Lee Cross Roads, Pa., 2 cars of bulk apples, one car of Ganos 2¼" and up at 70¢ per cwt. and 1 car of Cull Balck Twiggs and Staymans at 80¢ per cwt., to be shipped to complainants at Cleveland, Ohio; that immediately thereafter complainants contracted to sell the Ganos at $1 per cwt. and the Cull Black Twiggs and Staymans at $1.10 per cwt. f.o.b. shipping point; that, contrary to complainants wishes, the deposit of $50 given to the foreman was returned to complainants with the advice that the foreman could not ship the apples. Complainants sought to recover a loss of profit of 30¢ per cwt. on the two cars, or $144, plus $100 which was paid out because of inability to make delivery under the contract of sale entered into.

Respondent alleged complainants were advised the apples at the warehouse could be purchased for $1 per cwt.for cash but that the foreman had no authority to make sale; that complainants falsely represented to the foreman that purchase was to be made of the two cars at 70¢ per cwt. with a down payment of $25 per car. Complainant denied agreeing to pay $1 per cwt. and advice that the foreman had no authority to sell.

Complainants' counsel moved that, because of irregularities and omission of arguments of counsel the depositions be stricken from the record.

Rulings included in Decision

1. The Secretary said there was nothing to indicate the depositions were irregular in any way. It is clear that the notary public before whom a deposition is taken is not in a position to consider arguments advanced by either counsel. Counsel are afforded full opportunity to submit arguments to the Secretary of Agriculture. It did appear that specific objections and exceptions were not noted by the notary and apparently these objections were based upon the statement of counsel that the questions were irrelevant and immaterial. If objection had been made to every question asked by respondent's counsel it would not change the result of this order. Generally speaking the questions asked by respondent's counsel appear to have been fair and proper and even if some of the questions were leading there would not be sufficient ground for suppressing the depositions. No Federal court has held it was error to ask leading questions in an administrative proceeding. Whether the witnesses should be excluded while testimony is being taken has generally been left to the discretion of the examiner conducting the hearing or the notary or other officer before whom the testimony is taken and in no instance have the officers of a corporation, when it is a respondent, been excluded from the hearing room while someone else was testifying.

2. The evidence disclosed that the foreman of the packing plant had no authority to sell apples in carload quantities. The testimony on the question of whether in this particular case the officers of the respondent company authorized the foreman to make the sale of the apples at less than a dollar per cwt. was in direct conflict. One witness testified in the affirmative and at least three testified in the negative.

3. Complainant clearly failed to establish by a fair preponderance of the evidence that the apples were purchased from the respondent as alleged in the complaint. The complaint was therefore dismissed.

S-1271, May 4, 1936, Docket 1923: (Hearing)

DRIVER & WOODROW, WENATCHEE, WASH. v. FLEMING-WILSON MERCANTILE CO., TOPEKA, KANSAS.

Violation charged: Unjustified rejection of a carload of Delicious apples.
Principal point involved: Proof of contract; no meeting of minds.
Order: Complaint dismissed.

Outline of Facts

During the month of Oct. 1934, complainant and respondent exchanged several wires and letters concerning the purchase and sale of apples, one carload of which was accepted and paid for by respondent, and it was contended by complainant and denied by respondent that these wires included the purchase of a second carload to be shipped by complainant at a later date. On learning of respondent's contention that only one carload had been purchased complainant shipped the second one to Cleveland, Ohio, where it was sold by complainant for the account of respondent for a sum $592.07 less than the price at which complainant contended it was sold to respondent, and complainant sought an award of damages in that amount.

The record was in a badly scrambled condition with reference to whether respondent ordered one or two carloads of apples, the only question involved in this case. After an exchange of several wires respondent wired complainant "if you think good deal Delicious specified letter buy one car 90 days free storage" to which complainant replied "***think good deal confirm one car mixed Fancy Extra Delicious sizes specified 90 days free storage**." The later wire seemed to indicate that the question of whether respondent should purchase the carload of "mixed Fancy Extra Delicious apples" was passed back to it. Respondent failed to answer that wire.

Ruling included in Decision

Complainant failed to present sufficient evidence to warrant its contention that respondent contracted to purchase more than one carload of apples. Considering the record as a whole, it seemed reasonable to believe that complainant was negligent in confirming the second shipment and should not be permitted to take advantage of the ambiguous wires in binding respondent, who was clearly mislead to the extent that there was no meeting of the minds with respect to the purchase of the second carload. The complaint was therefore dismissed.

S-1272, May 5, 1936, Docket 2070: (S.P.)

JOS. EICHELBERGER & CO., EUSTIS, FLA. v. J.E. NELSON, ALTOONA, PA.

Violation charged: Unjustifiable rejection of a carload of watermelons.
Principal point involved: Whether respondent broker or purchaser.
Order: Complaint dismissed.

Outline of Facts

Complainant claimed that on June 12, 1935 a car of U.S. No. 1 23 lb. average watermelons was sold to respondent at the agreed price of $60 net f.o.b. Bamboo, Fla.; that the car was diverted to American Stores Co. at Johnstown, Pa. for the account of respondent; that when tender was made respondent refused to accept them but did not notify complainant of such refusal until four days after arrival of the shipment; and that the melons were sold by the carrier for $175.83 less than transportation charges. Complainant sought an award of $235.83 representing the $175.83 deficit in transportation charges plus the f.o.b. contract price of $60.

Respondent maintained that he acted only as broker in the transaction and that respondent telegraphed complainant as soon as notified of the refusal by the American Stores Co. for the alleged reason that they cut white instead of red.

The melons were inspected on June 8, 1935, by a Federal-State inspector at Bamboo Siding, Fla. and the certificate showed that the stock graded U.S. 1, 23 lb. average, with flesh red, crisp, juicy and sweet, grade defects within tolerance and no decay. The evidence showed that after preliminary wires, at 12:44 P.M. on June 12 respondent wired complainant "divert car twentythrees American Stores Johnstown invoice me seventyfive less brokerage confirm***"

Rulings included in Decision

1. Federal-State inspection certificate showed that the watermelons conformed in every way to the specifications set forth in the contract of sale. This was an f.o.b. sale, hence the Federal-State inspection certificate was prima facie evidence of such conformity.

2. The evidence submitted by complainant and by respondent disclosed that the watermelons were sold to the American Stores Co. and were rejected by that company and that respondent acted as a broker. The American Stores Co. was not made a respondent and the complaint against J.E. Nelson was dismissed.

S-1279, May 8, 1936, Docket 2044: (S.P.)

ANDREWS BROTHERS OF DETROIT, INC., DETROIT, MICH. v. J. AUSTEN HUNTER CO., CRYSTAL CITY, TEXAS.

Violation charged: Failure to account for a car of spinach.
Principal point involved: Set-off.
Order: Complainant awarded $131.85, with interest; respondent's countercomplaint dismissed.

Outline of Facts

On Dec. 18, 1934 complainant purchased from respondent a carload of spinach at the f.o.b. price of 65¢ per bushel, which was afterward shipped from the State of Texas to complainant at Detroit, Michigan. On December 22 complainant mailed a check for $691.20 to respondent, erroneously calculating the purchase price at 80¢ instead of 65¢ per bushel. Respondent recognized this error but cashed the check and, to reimburse complainant, issued a check to complainant for $128.60, being $1 less than the amount actually due, but later stopped payment on it, claiming this sum as damages because of dissatisfaction with the manner in which complainant handled a consignment of spinach contained in another car. Complainant sought to recover the amount deducted, plus $2.25 protest fee.

Rulings included in Decision

1. The transactions were on an entirely different basis, thus preventing a set-off of one account against the other. In a former decision the Secretary had held that in order to properly claim a set-off in connection with separate and distinct shipments both parties must have acted in the same capacity at the time of both shipments.

2. Respondent failed truly and correctly to account to complainant within the meaning of the Act. Complainant was therefore awarded $129.60, plus $2.25 protest fee, or a total of $131.85, with interest.

3. Respondent's countercomplaint was dismissed.

S-1281, May 11, 1936, Docket 2077: (S.P.)

LEO H. WRIGHT & SONS, MOORHEAD, MINN. v. SHUBERT BROKERAGE CO., OMAHA, NEBR.

Violation charged: Failure to account.
Principal points involved: Buyer liable for balance of purchase price of accepted stock.
Order: Complainant awarded $114.40, with interest.

Outline of Facts

On or about March 15, 1935 complainant sold to respondent a carload of U.S. No. 1 potatoes, consisting of 180 sacks of Cobblers, at the agreed price of $1.20 per cwt., and 180 sacks of Ohios at the agreed price of $1.47 per cwt., or a total of $480.60, less freight of $151.20 and brokerage of $15, leaving a net sale price of $314.40. The potatoes were shipped from Halma, Minn. to Omaha, Nebr. They were accepted by respondent, who made a payment on account of $150 and after complaint was filed with the Department made an additional payment of $50, leaving a balance of $114.40 due, which respondent admitted owing and promised to pay as soon as possible.

Ruling included in Decision

The potatoes conformed to the specifications of the contract of sale and were accepted by respondent who had paid $200 on account. Complainant was awarded $114.40, with interest.

S-1286, May 13, 1936, Docket 1979: (S.P.)

L. YUKON & SONS PRODUCE CO., KANSAS CITY, MO. v. MILLER & JACOBSON, CAMBRIDGE, MINN.

Violation charged: Failure to ship 3 carloads of potatoes conforming to contract specifications.
Principal points involved: Proof of damages; reference to market reports.
Order: Complaint dismissed.

Outline of Facts

In the latter part of March, 1935, through a broker, complainant purchased from respondent 3 carloads of Cobbler potatoes of "good quality, size, inspection on arrival with seed tags," as shown by the confirmations of sale, at $1.06 per cwt. delivered at Kansas City, Mo., shipment being made from Cambridge, Minn. Complainant rejected the shipments for the alleged reason that the potatoes were not of the kind, quality and variety purchased and sought an award of damages in the amount of $59.40 on the first car and $68.40 on each of the other two cars, figured on the basis of the minimum carload of 360 sacks at the difference between the carload market price of potatoes of like kind and quality and the purchase price of potatoes as shown by the confirmation, being 16½¢ per sack for the first car and 19¢ per sack for the other two.

The evidence disclosed that one car arrived on March 27 and the other two on March 29 and that Federal inspection was secured on one car on April 6, the deposition of the inspector showing that the potatoes did not conform to the specifications of the contract because they were not of good quality at the time of arrival. There was no evidence that the other cars were inspected and it was not clear why the one car was held until April 6 before inspection was made.

Ruling included in Decision

Complainant failed to establish legal damages. It attempted to show damages by submitting market reports showing that U.S. No. 1 Cobbler potatoes were selling on an average of approximately 16¢ to 19¢ more on the date the potatoes arrived than the contract price. However, it was not shown that it had any contract for the sale of potatoes such as were described in the contract of sale and admitted that no potatoes were bought to replace the ones rejected. The complaint was dismissed.

S-1288, May 12, 1936, Docket 1811: (S.P.)

M. J. McCARTHY & CO., CHARLESTOWN, MASS. v. B.B. KIRKLAND SEED CO., COLUMBIA, S.C.

Violation charged: Rejection.
Principal points involved: Measure of damages; too long delay in making resale.
Order: Complaint dismissed.

Outline of Facts

On November 2 and November 21, 1934, complainant, through a broker, sold to respondent 3 carloads of seed potatoes to be shipped from points in Maine to respondent at Columbia, S.C. Respondent was to give complainant shipping instructions but failed to do so and complainant therefore sold the potatoes on April 12, shipment having been made to Boston, Mass. Complainant sought an award for $465.81, the difference between the amount for which the potatoes were sold to respondent and the amount realized from the resale, $458.52.

Respondent contended that complainant notified it on Feb. 28 that the potatoes were being sold for respondent's account and that if they had been sold at that time instead of April 12 there would have been no loss. Complainant admitted having notified respondent on February 28.

Rulings included in Decision

1. Respondent did not give shipping instructions on the three cars and therefore breached the contract.

2. Complainant did not establish any legal damage. The proper measure of damages would be the difference between the contract price of the potatoes and what they would have sold for on or about Feb. 28, 1935, and not April 12, 1935. Complainant should not have waited more than forty days, or from Feb. 28 to April 12, to sell said potatoes. The complaint was therefore dismissed.

S-1295, May 15, 1936, Docket 2102: (S.P.)

J.E. NELSON, ALTOONA, PA. v. NELSON & CO., INC., OVIEDO, FLORIDA.

Violation charged: Failure to account for an initial icing charge.
Principal points involved: Responsibility for initial icing charge on f.o.b. shipment; right to file complaint.
Order: Complaint dismissed.

Outline of Facts

On or about May 7, 1935, complainant, acting as a buying broker, purchased a carload of White Rose celery from respondent for shipment to the American Stores Co. in Newark, N.J. at the f.o.b. price of $2.25 per crate, plus precooling charges. At the time of the purchase respondent had a carload of celery in transit, which had previously been shipped from Florida, upon which an initial icing charge of $22.50 had been paid by respondent, and this car was applied on the contract. The contract made no mention of provision for refrigeration in transit but respondent nevertheless added this charge for initial icing to the invoice price, and the draft as drawn by respondent was paid by American Stores Co. who later deducted the $22.50 from the remittance made to complainant, and it was for this deduction that complainant brought this proceeding against respondent.

Respondent claimed that since the car had rolled prior to the time the sale was made to American Stores Co., it was necessary that the shipment be protected in transit by some method of refrigeration, which was supplied by the initial ice, and that since no mention was made in the contract of sale with respect to refrigeration in transit respondent used his best judgment; that American Stores Co. received a copy of the invoice showing the method of refrigeration and thereafter paid the draft, accepted the shipment and unloaded the car, instead of rejecting the shipment and refusing to pay the draft, as would have been the case had the charges been incorrect; and that it is not customary for shippers to pay either transportation or refrigeration charges on f.o.b. shipments.

Ruling included in Decision

1. Complainant failed to show his right to maintain this proceeding against respondent under the Act. The broker (complainant) is not a proper party complainant against respondent. The facts were insufficient to warrant a conclusion as to whether he could proceed under this Act against American Stores Co. or whether this company has any basis for filing a complaint against the shipper, who is the respondent in this case. The complaint was dismissed.

S-1299, May 19, 1936, Docket 2010: (S.P.)

RICHMAN & SAMUELS, INC., NEW YORK, N.Y. v. MUNN-GRIFFIN & CO., ROCKY MOUNT, N.C.

Violation charged: Unjustified rejection of a car of onions.
Principal points involved: Time of shipment essential specification; right to raise additional ground of defense after complaint filed.
Order: Complaint dismissed.

Outline of Facts

On or about June 10, 1935, through a broker, complainant by contract in writing, sold to respondent a carload of 510 sacks of U.S. No. 1 wax onions at $1.40 per sack f.o.b. Texas shipping point, or $714, the date of shipment being specified as June 7. The onions were shipped from Hutchins, Texas to Rocky Mount, N.C. and upon arrival at destination respondent rejected them, claiming at first that the onions were not up to contract requirements and subsequent to the filing of this complaint contending that rejection was made on the added ground that the shipment was not made by respondent until June 8. Complainant sought an award for $389.64, the difference between the contract price and the net sum realized upon resale, $324.30.

Complainant contended that respondent's rejection of the shipment on the ground that the onions failed to meet contract requirements waived any right which it may have had to object to complainant's failure to ship at the time specified in the contract. In his discussion on this point the Secretary said that in certain cases the party rejecting a shipment might quite properly defend on the ground that complainant failed to comply with the terms of the contract in some respect quite different from the objection raised at the time of rejection, while in other cases respondent might be estopped from setting up such defense. It was admitted that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections which might have been properly made. This may be the situation in cases where the silence of the purchaser and his conduct are such as to mislead the seller and prevent him in some way from protecting himself.

Rulings included in Decision

1. The certificate of Federal inspection made at shipping point showed that the onions graded U.S. 1., and therefore met contract requirements since the parties agreed to a sale on an f.o.b. basis.

2. The evidence was conclusive that complainant did not comply with the terms of the contract with respect to the time of shipment. The certificate of Federal inspection at shipping point showed definitely that the inspection was not completed until 7:30 p.m. on June 8, 1935 and the inspector confirmed this statement in a telegram sent to this Department on April 29, 1936. This positive assurance on the part of the Federal inspector that he inspected the onions at shipping point on June 8, 1935 convinced the Secretary that shipment was not made on the previous day as claimed by complainant.

3. There was nothing in the record to indicate that respondent waived any rights. Respondent's failure to notify complainant of its objection to the time of shipment until the answer to the complaint was filed was immaterial since respondent could have rejected the shipment without stating any reason whatever and later set up any reasons which it may have had, provided such silence in no way damaged complainant. The record contained no proof that complainant was in any way damaged by lack of knowledge that respondent rejected the shipment on the added ground of failure of complainant to ship on the date specified in the contract. If respondent at the time of filing its answer had for the first time raised the objection that the onions were defective in some particular and in this manner shifted its defense to other grounds after the means of proof in rebuttal could reasonably be presumed to have been destroyed, a very different situation from that in the instant case would be presented. In this case, however, the actual date of shipment could be proved six months or a year after shipment was made as easily as at the time of rejection. Where, as in the instant case, respondent rejected the onions for a stated reason, their silence as to the other objections

which would justify refusal to accept, in the absence of conduct which could have in some way misled and prejudiced complainant, cannot be construed as preventing them from insisting on their defense of nonperformance of complainant in failing to make shipment on the date specified in the contract. Respondent rejected the onions promptly, stating at least one objection, and if it had others there was no evidence that the failure to disclose them damaged complainant.

4. Respondent's rejection was justified since complainant failed to make shipment on the day specified in the contract and for this reason the complaint was dismissed.

S-1301, May 22, 1936, Docket 2188: (Hearing)

F.H. SIMPSON CO., FLORA, ILL. v. CHARLES G. IBACH, MOBILE, ALABAMA.

Violation charged: Failure truly and correctly to account for a carload of peaches.
Principal point involved: Respondent liable for net proceeds realized from sale of consigned produce.
Order: Complainant awarded $330, with interest.

Outline of Facts

On or about August 20,1935, complainant diverted to respondent at Mobile, Alabama a car containing 387 baskets of peaches shipped from Walnut Hill, Ill., which was accepted by respondent and sold for the account of complainant, and complainant sought an award for the proceeds of the sale.

No formal answer was filed by respondent, but at the hearing at Mobile respondent admitted the allegations of this complaint and the disciplinary complaint brought by H.A. Spilman, an employee of the U.S. Department of Agriculture, Docket 2159, S-1307, based on the same transaction, and that net proceeds of $330 were received from the purchaser of the car, which sum respondent had failed to pay to complainant because of financial difficulties.

Ruling included in Decision

The record showed the sum of $330 to be due and owing complainant, for which amount, plus interest, an award was issued in favor of complainant.

S-1302, May 21, 1936, Docket 2016: (S.P.)

NATIONAL FRUIT & VEGETABLE EXCHANGE, INC., AGENT FOR MAINE POTATO GROWERS, INC., NEW YORK, N.Y. v. BAY FRUIT COMPANY, INC., CHARLESTON, S.C.

Violation charged: Unjustified rejection of carload of potatoes.
Principal points involved: Breach of contract by complainant; delay in date of shipment.
Order: Complaint dismissed.

Outline of Facts

On or about Sept. 13, 1934, complainant sold to respondent two cars, 500 10-peck sacks, of Maine Selected Seed Cobbler potatoes at $2.40 per sack delivered Charleston, S.C., to be shipped in January, February, 1935. Respondent ordered from complainant, through an agent, one carload under date of Jan. 10, with directions that it be shipped immediately. The agent promptly advised complainant of these instructions, which were overlooked by complainant, and the potatoes were not shipped from Maine until Jan. 26. Complainant claimed that the second car was shipped on Feb. 26 and because of respondent's rejection of this car complainant sought an award for $188.01, the difference between the amount for which the potatoes were sold to respondent and the amount realized upon resale of them, $199.37.

The evidence disclosed that, as contended by respondent, due to the delay in shipping the potatoes the respondent had to purchase other potatoes and advised the broker that notwithstanding that the complainant had been guilty of a breach in contract by not shipping the potatoes ordered, it would take the car of potatoes shipped on Jan. 26 in place of the second car of potatoes.

Rulings included in Decision

1. Complainant breached the contract by not shipping the first car of potatoes promptly at the time they were ordered by respondent. Complainant's agent knowing this fact, felt that the respondent could not be required to accept the car of potatoes shipped Jan. 26 and thought that it would be fair to both complainant and respondent to agree on behalf of complainant that the car would be accepted in lieu of the second car, and so advised his principal.

2. Complainant failed to show that respondent rejected the second car without reasonable cause and, therefore, the complaint was dismissed.

S-1303, May 22, 1936, Docket 1803: (Hearing)

C.F. SCHAEFER CO., YAKIMA, WASH. v. ZIMMERMAN BROS., BALTIMORE, MD.

Violation charged: Unjustified rejection of a carload of Italian prunes.
Principal points involved: Broker agent of both parties; destination inspection evidence of quality and condition at shipping point in f.o.b. sale; proof of special damages.
Order: Complaint dismissed; respondent awarded nominal damages of $1.

Outline of Facts

On or about Aug. 30, 1934, through a broker, following an exchange of wires between complainant and the broker, complainant sold to respondent a carload of prunes, the memorandum of sale issued by the broker specifying: "1 car U.S. No. 1 Washington Italian prunes in half-bushel tubs faced, curtain and ribbon across face at 75¢ per half-bushel tub f.o.b. *** to be fresh pack stock." On Sept. 2 the prunes were shipped from Washington State to respondents at Baltimore, Md. and arrived on Sept. 12, which was within the usual time required for transportation for a shipment of produce from the State of Washington to the State of Maryland. After rejection of the shipment, complainant sold the prunes for the net sum of $486, or $140.61 less than the total freight and selling charges at auction, and sought an award for $800.61, for loss sustained.

Respondents alleged that the purchase and sale agreement was oral and not enforcible; and denied that the broker was their agent and that the complainant tendered to respondents a carload of prunes in compliance with the contract. By way of counterclaim respondents asked damages of $93.41 based on the claim that the prunes were "soft, with a maximum decay of 25%."

Federal inspection at Baltimore on Sept. 13 for condition only, necessarily confined to the accessible portion of the load consisting of the 3 upper layers, showed that the prunes examined were mostly soft, an average of 5% of the shipment was decayed as a result of Rhizopus Rot; an average of 2% was cracked open and a portion of the shipment was found to be bruised as the result of the shifting of the load. There was no shipping point inspection.

Rulings included in Decision

1. Respecting respondent's contention that the oral purchase and sale contract was not enforcible because no note or memorandum thereof was made and signed by respondents or their agent so as to conform to the requirements of the statute of frauds, the evidence showed that respondents submitted a counter-offer to complainant, through the broker, of 42-1/2 cents for display lugs and to that extent, at least, made the broker their agent. The broker's memorandum thereby became respondents' memorandum. Moreover, respondents based their counterclaim on the claimed breach of complainant's warranty and thereby recognized the enforcibility of the contract of purchase and sale.

2. The contract must be presumed to be accurately expressed in the quoted portion of the memorandum of sale. This memorandum appeared to be in accord with the terms and specifications expressed in the exchange of wires mentioned and the broker testified that copies of the memorandum were sent to both complainant and respondents, neither of whom, so far as the record showed, made any objection whatever to the terms of the agreement as set forth by the broker.

3. Complainant failed to deliver the quality and grade of prunes which respondents contracted to purchase. Since this was clearly an f.o.b. sale the destination inspection could only be considered in so far as it indicated the quality and condition of the prunes at the time and place of shipment. This inspection certificate seemed clearly to indicate that had the prunes been up to contract requirements at shipping point they would not have deteriorated to the extent found at destination, since the record showed that the car moved on schedule time and apparently under proper and adequate refrigeration. The affidavit of Mr. George E. Beeks, stating that the prunes were of U.S. No. 1 quality on September 2, 1934, could not be accepted as proper proof of the quality and condition of this shipment at the time of delivery to the carrier, since this affidavit was not made until Nov. 21, 1934, and lacked all of the requirements of an official inspection certificate, and failed to show that any notes whatever were made by affiant at the time of making examination of the prunes. The complaint was dismissed.

4. Where, as in the instant case, the shipper must be presumed to have known that the produce was purchased by respondents for resale, it seems reasonable to hold that respondents' loss of profits constituted special damages which were impliedly within the purview of the parties. Respondents' proof of damages sustained in this case, however, was deemed insufficient to establish a basis for computation because respondents failed to furnish proof that any effort whatever was made to secure a replacement of the shipment. Respondent was awarded nominal damages of $1 against complainant.

S-1304, May 22, 1936, Docket 2118: (S.P.)

H.L. STEFFEN & SONS, INC., FAIRPORT, N.Y. v. MINNECI FRUIT CO., PITTSBURGH, PA.

Violation charged: Unjustified rejection of a carload of celery.
Principal point involved: Definition of "individually washed."
Order: Complaint dismissed.

Outline of Facts

On Sept. 11,1935, through a broker, complainant sold to respondent a car of U.S. 1 individually washed celery at $2.35 per crate delivered Pittsburgh, which was shipped from Waynesport, N.Y. to Pittsburgh, Pa. Respondent claimed that the celery was not individually washed and rejected it and it was resold by complainant for the net sum of $140.23, or $465.87 less than the original contract price. Complainant maintained the celery was individually washed and sought an award for $465.87.

The celery was inspected by a Federal inspector on Sept. 16, 1935, the inspection certificate reading, in part: "Stock is well trimmed, mostly fairly clean, many stalks slightly dirty, generally fairly well to well blanched. Grade defects average 5 per cent, principally insect injury and a few poorly blanched."

Rulings included in Decision

1. The celery was not individually washed as called for in the contract of purchase and sale. Complainant submitted evidence which tended to show it was so washed, while respondent's sworn statement was to the contrary. Greater weight should be given to the statements made by the Federal inspector who is impartial in the matter. Furthermore, under the law the Federal inspection certificate is prima facie evidence of the truth of the statements therein contained. Leading dictionaries define the verb "wash" as meaning cleansed by the application of water, and the term "individually washed" as used commercially means cleansed by the application of water to each stalk. The statement quoted above from the inspection certificate shows that the celery was not cleansed, that is, freed from dirt. Hence it must be deemed not to have been individually washed as that term is commercially understood and used.

2. Respondent's rejection was not without reasonable cause. The complaint was therefore dismissed.

S-1306, May 23, 1936, Docket 2111: (S.P.)

MACINTYRE & PORTER, ROCHESTER, N.Y. v. FRANKOS BROS., CHICAGO, ILL.

Violation charged: Unjustified rejection of car of apples.
Principal points involved: Color of Rhode Island Greening apples; freezing in transit in f.o.b. sale.
Order: Complainant awarded $166.40 with interest.

Outline of Facts

On or about Jan. 26, 1935, through a broker, complainant sold to respondents a carload of Rhode Island Greenings, f.o.b. Wallington, N.Y., at $1.10 per bu., the confirmation of sale reading, in part: "ringfaced 2½ inch and larger USone - good green stock good pack." The apples were shipped from Wallington, N.Y. on Jan. 26 to Chicago, Ill., where they arrived on Jan. 29. After negotiations between the parties as to acceptance the shipment was rejected by respondent on or about Feb. 1. Complainant sought an award for $166.40, the difference between the amount for which the apples were sold to respondents and the net sum of $413.30 realized upon resale.

Respondents defended their rejection on the ground that the apples did not meet the specification "good green stock" and that many baskets were damaged from being water-soaked and discolored and some baskets contained ice and snow on the covers; and objected to the claimed damages on the ground that complainant did not dispose of the apples with due diligence after rejection, stating that two offers of $1.20 per bu. were refused by complainant.

Federal inspection certificate issued on Jan. 29 read, in part: "Stock is mostly firm, many firm ripe with an occasional ripe. Less than 1% decay. In bottom layer baskets next one doorway stock is frozen extending up from floor from 3 to 6 inches and above that height, in from side of basket next door, from 2 to 3 inches. In 3 upper layer baskets next door, stock is frozen extending in from side next door, from ½ to 1 inch. Stock now fails to grade U.S. No. 1 only account freezing noted above."

Rulings included in Decision

1. The apples conformed to the specifications of the contract of sale. Both parties relied largely upon the Federal inspection certificate, which stated that the apples failed to grade U.S. 1 "only account freezing." Since the apples were sold f.o.b. shipping point, the complainant was not responsible for the damage due to freezing. The temperature according to the inspector, ranged from 28 degrees at the bottom to 30 degrees at the top of the car. There was nothing in the inspection certificate indicating that the apples did not conform to the specifications of the contract of sale at the time they were shipped. Respondents relied upon the testimony of two deposition witnesses who stated, in substance, that some of the apples were yellow. It is well known to the trade that in the fall the Rhode Island Greening is green and later it develops a yellow color. These apples were purchased the latter part of January out of cold storage. The contract should receive a reasonable interpretation. It is not reasonable to suppose that some of the apples would not be yellow on Jan. 26.

2. Respondent's rejection was without reasonable cause and following the rejection complainant sold the apples for the best price obtainable and suffered damages in the sum of $166.40. There was nothing in the evidence to indicate that complainant did not exercise reasonable diligence in disposing of the apples. The account sales showed that slightly over half of the apples sold at $1.30 to $1.50 per bu. and considerably over half sold for more than $1.20. Complainant was awarded $166.40, with interest.

S-1311, May 28, 1936, Docket 1969: (Hearing)

CALIFORNIA PRODUCE DISTRIBUTORS, INC., LOS ANGELES, CALIF. v. UNITED BROKERS CO., PORTLAND, OREGON.

Violation charged: False and misleading statements for a fraudulent purpose.
Principal points involved: Failure to report not necessarily a false and misleading statement; neglect not prohibited by statute; false information given or material information omitted could be in violation of the statute.
Order: Complaint dismissed.

Outline of Facts

In response to respondent's telegram sent from Portland, Oregon on March 1, 1935 reading "PARDON DELAY REPLYING YOURS LAST NIGHT SIXES SELLING ABIJA (2.25) WE HAVENT SURPLUS ROLLING AND IF YOU CANT MOVE YOUR CAR THERE TO ADVANTAGE WE PROBABLY CAN WORK IT OUT EITHER HERE OR SEATTLE," complainant consigned to respondent a carload of lettuce shipped during March from Los Angeles, Calif. to Portland, Oregon. The shipment arrived at Portland on or about March 5 and thereafter and on March 1, 6, 12,15, 22 and April 2 respondent sent telegrams and wrote complainant letters which were received as exhibits at the hearing and referred to in the decision. Complainant claimed that because of false and misleading statements made by respondent it suffered loss in the total amount of $499, for which reparation was asked. Respondent denied that complainant was led to believe that respondent would dispose of the lettuce either upon the Portland or Seattle market promptly upon arrival of the said shipment at Portland and that the wires and letters referred to in the complaint were false or misleading. The correspondence quoted in the decision and reports to complainant, indicated that respondent deemed the car to be in good condition with sufficient ice to hold for a better market and when it was finally broken it was discovered that, although not showing decay, the lettuce showed considerable red, which respondent attributed to the melting of the ice and its being gradually absorbed into the heads. Sales were completed on March 29 and respondent's account of sale results showed a gross return of $209. Respondent paid the freight charges and demurrage, and after deducting a brokerage of $25 reported a deficit of $115.72.

Rulings included in Decision

1. The sending of the said wires and letters by respondent to complainant and the statements therein made were not false or misleading or made for a fraudulent purpose. Complainant's deposition evidence and the examination of the witnesses at the hearing indicate that the question of respondent's negligence, or lack thereof, constituted complainant's chief criticism of respondent's handling of the shipment. It is obviously true that the load should have been sold in some manner at an earlier date than it was finally disposed of. Respondent's letter of April 2 amounts to such an admission. Moreover respondent's reports to complainant do not appear to have been as frequent and as voluntary as complainant had the right to expect from a careful agent. Following arrival of the car up to and including the date of respondent's account of sales, March 5 to April 2, the only reports made were respondent's wire of March 6 and its letters of March 12,15, 22 and April 2. But a failure to report is not necessarily a "false and misleading statement." Negligence, if respondent's handling of the load can be said to constitute negligence, is not the thing prohibited by the statute. This would be otherwise if the reports made were incorrect or misleading. False information given or material information omitted in a report could be in violation of the statute. In the instant case, however, the reports that were made appear to have been substantially true. Respondent's conduct is chiefly objectionable because of the infrequency of the reports and the lack of good judgment exercised in holding the lettuce for market improvement.

2. Since respondent's said statements in said telegrams and letters were not violative of section 2, the complaint was dismissed.

S-1315, June 2, 1936, Docket 1648: (Hearing)

LITCHARD, SCHULTHEIS & JOHNSON, INC., WELLSVILLE, N.Y. v. H.G. SWAN, NEW BERN, N.C.

Violation charged: Failure to deliver.
Principal points involved: Depositions conforming to Department's procedure properly admissible as evidence; burden of proof on complainant to establish warranty and breach thereof; absence of shipping point inspections in fob sale increases necessity of establishing extent of decay at destination.
Order: Complaint dismissed.

Outline of Facts

In the month of June, 1934, by oral contract, complainant, through its agents, purchased from respondent a total of 32 carloads of potatoes f.o.b. loading points, some of them having been inspected by the agents. Complainant resold the stock to various purchasers and made diversion to various destinations and the purchasers of 16 carloads complained that due to excessive decay the potatoes did not conform to complainant's warranty, which necessitated adjustments totaling the sum of $1627.17, less the purchase price paid by complainant to respondent, plus transportation charges, reconditioning costs and other like expense items. Complainant sought an award of damages by reason of the failure of respondent to deliver U.S. 1 grade stock, free from disease and other defects as expressly guaranteed and warranted by respondent. Respondent denied the warranty and alleged complainant bought the stock "as is" after inspection. At the hearing respondent objected to receipt of complainant's depositions because they were not taken "according to law", urging that they were not "sealed as required by the laws of the State of North Carolina."

Rulings included in Decision

1. The depositions in question were properly executed and the notaries public named in the several orders of the Secretary attached the usual certificates as a part of the completed depositions. Sec. 13(d) of the Act authorizes the Secretary to "order testimony to be taken by depositions***." Sec. 3, par. 1, of the regulations specifies the information required to be furnished before an order will be issued. The depositions conformed to the Department's procedure and were properly received by the examiner.

2. Complainant's proof was insufficient to establish the warranty claimed or a breach thereof. It would seem that if these purchases were made as grade U. S. No. 1 stock, complainant would have been interested in securing Federal inspections to establish the grade warranted. While the mechanical grader, described by one or more of the witnesses as having been used in sorting the potatoes, might be relied upon to establish their minimum size, other grade requisites such as elimination of those affected by rot could not be accomplished by the use of the grader. Several deposition witnesses stated their conclusions to the effect that the potatoes failed to grade U. S. 1 at the different destinations but none supplied facts. The loads in question having been purchased on an f.o.b. basis and no inspections having been made to establish the extent of decay at loading points, if any, made it additionally necessary for complainant to establish the extent of decay found at the different destinations to which the cars were consigned. This would be so even if the testimony clearly showed that the purchases were made upon the express warranty claimed by complainant. Only two cars were inspected at destination where an attempt was made to show the percentage extent of decay. U. S. Standards allow a tolerance of 1% for soft rot and wet breakdown in grade U. S. No. 1 stock. The complaint was dismissed.

S-1316, June 2, 1936, Docket 2000: (S.P.)

LaMANTIA BROTHERS, ARRIGO CO., CHICAGO, ILL. v. KELLEY & SMITH, MERCEDES, TEXAS.

Violation charged: Failure to account for half of deficit in joint account.
Principal point involved: Unauthorized diversion of car to be handled on joint account relieves from liability for half of loss.
Order: Complaint dismissed.

Outline of Facts

In accordance with a contract entered into on or about Nov. 7, 1934, respondent shipped from Mercedes, Texas to complainant at Chicago, Ill. a carload of tomatoes to be handled on joint account. Complainant diverted the car to Philadelphia, Pa. to be sold on behalf of complainant and respondent, and after deducting the joint cost of $562.60, a loss was sustained on the sale of the tomatoes at Philadelphia in the sum of $273.69, one-half of which, or $136.84, complainant contended respondent should pay. Respondent claimed that the tomatoes were diverted from Chicago without its knowledge or consent and that no opportunity was afforded to protect its interest and therefore all liability was denied. Respondent alleged that on Nov. 14, in answer to a request for information, complainant advised that the car was rolling East and that respondent promptly wired asking to whom and to what market the tomatoes had been diverted and was informed that the car had been diverted to L.D. Goldstein, Philadelphia.

The evidence showed that on Nov. 6 complainant's representative informed complainant by wire that respondent "prefers your jobbing his tomatoes" and on April 29 telegraphed complainant "reference Smith's ART 19651 tomatoes jointed although his intentions your jobbing Chicago he also preferred your using your best judgment as to where you disposed."

Ruling included in Decision

Complainant diverted the car of tomatoes which was to be handled on the basis of a joint account at Chicago from the latter point to Philadelphia, Pa. without the knowledge or approval of respondent and complainant's claim for one-half the net loss was therefore dismissed.

S-1321, June 3, 1936, Docket 2119: (Hearing)

WALTER CHAMBERS, SECRETARY, DEPARTMENT OF PUBLIC MARKETS, WEIGHTS AND MEASURES OF THE CITY OF NEW YORK v. HARRY BONSIGNORE, alias PAUL DI GEORGE, and FRANK CASINO, PARTNERS TRADING AND DOING BUSINESS AS THE UNION PACIFIC PRODUCE CO., NEW YORK, N.Y.

Violation charged: False and fraudulent misrepresentations in obtaining license; failure to account promptly to shippers of perishable agricultural commodities (artichokes)and failure to keep adequate records.
Principal point involved: Failure to account promptly is violation of the Act.
Order: Case dismissed.

Outline of Facts

The complaint charged that respondents secured their license through false representations in that Harry Bonsignore, who at the time was indicted in the Federal District Court, gave his name as Paul DiGeorge in the application; that respondent Frank Casino has been convicted of violations of the criminal codes of New York and Florida; that these two men were not the true partners but were associated with other criminals as partners of respondent, and that respondent has willfully failed to keep proper accounts and records as required by the Act. Respondents denied that they made any misrepresentations in applying for a license and claimed that the name Paul DiGeorge was adopted as being simpler than the name Bonsignore, that Paul DiGeorge has never been convicted of any crime, that the conviction of Frank Casino in one instance would not prevent the Secretary of Agriculture from granting a license and that Paul DiGeorge and Frank Casino were the only partners doing business under the name of Union Produce Co.

An investigator from the Department on January 7, 1936 examined the accounts, records and memoranda kept by respondents and he testified as to his findings of amounts owing to various firms, some of whose books were also examined, on some of which accounts respondents made payments at the time of the investigation. He also testified that on Dec. 24, 1935, when the dealers sold the last artichokes to respondents, there was no outstanding indebtedness beyond Dec. 14, 1935, with the exception of disputed claims to which reference was made in the decision. The testimony of Harry Bonsignore corroborated that of the investigator and that witness alleged that the name Paul DiGeorge was assumed for business purposes and that he is properly registered with county and city officials under that name.

Rulings included in Decision

1. Complainant failed to prove that respondents obtained their license through false and fraudulent misrepresentations made at the time of filing application or that respondents' books and records were inadequate and incorrect.

2. Respondents failed to account promptly to Miller-Gerow Co. Inc. in the sum of $1799.75; to Carbone Bros. & Co. in the sum of $1473.50; and to Tassini & Salisch, Inc. in the sum of $1588.50. However, no disciplinary action could be taken by this Department since respondents' license expired on April 10, 1936. The complaint was therefore dismissed.

S-1323, June 5, 1936, Docket 2140: (S.P.)

DEMASE & MORGAN CO., PITTSBURGH, PA. v. JOHN C. MAURER & SONS, STOCKTON, CALIF.

Violation charged: Failure to deliver two carloads of celery conforming to contract specifications.
Principal points involved: Size of crates; proof of damage; necessity for prompt purchase of replacement car.
Order: Complaint dismissed.

Outline of Facts

On Oct. 29, 1935, through a broker, complainant bought from respondent two cars of Red Lion brand fancy celery, good bleach, individually washed, tops fresh and green and extending well above tops of crates, tight pack, California style, 22-inch half-crates, as near as possible to specified sizes, at $2.85 per half-crate delivered at Pittsburgh, Pa., to be shipped from California to respondent at Pittsburgh, Pa. The celery was packed in 20 inch crates and complainant sought an award of $189, a loss of $94.50 on one car, being the difference between what the celery would have been worth had it met the specifications of

the contract and the market value of the celery actually delivered, and a like amount of $94.50 on the other car, being the difference between the contract price and the sum which complainant was obliged to pay for a car of celery to meet its requirements in replacing this car.

Respondent denied that it shipped celery inferior to that called for in the contract and objected to complainant's calculation of damages on the ground that the Pittsburgh market on the best celery, regardless of specification, at the time the first car arrived was "negligibly $2.75, but mostly $2.50, in a jobbing way" and on Monday, Nov. 11, when the second car arrived, the top jobbing market was $2.85 delivered. The official records of this Department disclose that the prices were substantially the same as those stated by respondent.

Rulings included in Decision

1. The celery shipped did not comply with the specifications of the contract. The contract definitely specified that the celery should be 22 inch and the celery shipped was 20 inch.

2. Complainant was not entitled to damages for the reason that the market price of celery at the time the two cars arrived and at the time the car was purchased by the complainant in place of one of the cars, was not above the original contract price. If the celery had been purchased by the complainant at the market price, no damage would have been sustained. The car that was purchased by the complainant on Nov. 15, 1935, which was approximately a week after the first car arrived and four or five days after the second car arrived, was purchased at $3.10 per half-crate. The original purchase price on each car was $2.85 and the jobbing market on half-crates of celery on Nov. 15 ranged generally from $2.50 to $2.75, with a few at $2.85.

S-1330, June 18, 1936, Docket 2138: (Hearing)

BALD KNOB SALES AGENCY, BALD KNOB, ARKANSAS v. WILLIAM R. HEDBERG & C.F. KARKALITS, ST. PAUL, MINN.

Violation charged: Failure to account for the agreed purchase price of a carload of strawberries.
Principal points involved: "Good" merchantable quality; original contract modified by later agreement.
Order: Complaint dismissed.

Outline of Facts

On or about May 11, 1935, complainant sold to respondents a carload of strawberries at the agreed price of $1154.50 f.o.b. Bald Knob, Arkansas. The load was consigned to respondents at St. Louis, Mo. and diverted by respondents to a prospective purchaser at Milwaukee, Wisconsin where it arrived on May 13. On May 17 respondents informed complainant their Milwaukee purchaser had refused the shipment because of the extent of soft berries and that an accounting would be made of sales at Minneapolis and no charges made by respondents for such service. By letter dated May 18 complainant adopted and confirmed the handling of the berries in the manner stated by respondent. They were sold in Minneapolis, Minn. some time prior to May 20 for a gross return of $1097.30 and respondents accounted and remitted to complainant the net proceeds of $630.58, which amount was accepted by complainant. Complainant sought an award for $523.92 as the balance still due under the contract.

Respondents claimed the berries were not of "good merchantable quality" as warranted and that the contract was breached by the shipment of hold-over berries; complainant denied any warranty and claimed the berries were to be of the usual field run common to Bald Knob and that respondents accepted the load through diversion at St. Louis. The only direct evidence of condition at loading point was furnished in depositions submitted, it being stated that the berries were good quality, sound, firm and dry and should have carried in good condition in transit; that 106 crates were placed in a pre-cooled refrigerator car for about 18 hours with the doors closed, being held over from the night of May 10 to May 11, but there was no difference between the hold-overs and those picked on May 11. The railway agent at Bald Knob stated that strawberries are often held over as long as 48 to 60 hours before shipment without any impairment of the quality. Respondents presented practically no details concerning the condition found at Milwaukee or at Minneapolis.

Rulings included in Decision

1. A consideration of all the evidence indicated that the berries were of good merchantable quality at the time of purchase at loading point. The gross sale price at Minneapolis showed they were merchantable. The additional word "good" is very indefinite. Moreover this was an f.o.b. shipping point purchase and the resale at Minneapolis was from a week to ten days following purchase. There was no way of determining whether the "hold-over" berries brought the lowest price. The exhibits indicated that only a few crates sold for less than $2. The general range was from $2 to $3.50 per crate.

2. Respondents' sale of the berries at Minneapolis and the payment to complainant of the net returns was adopted and approved by complainant and the original contract of sale was to that extent modified. The complaint was therefore dismissed.